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What's Left of Solidarity? Reflections on Law, Race, and Labor History

MARTHA R. MAHONEY†

Institutions and institutional rules—not customs, ideas, attitudes, culture, or private behavior—have primarily shaped race relations in America.¹

Until recent decades at least, the history of the white working class, *in its majority*, was one of self-definition in opposition to an often-demonized racial Other and intense resistance to the request of African Americans for full citizenship. In this sense white workers hardly constituted a class apart. Rather, many of them shared in the white supremacist cultural reflexes of the larger society and eagerly laid claim to the “public and psychological wage” that they hoped membership in the “ruling nation” would afford.²

INTRODUCTION

Law hides the prescriptive power of the state so well that sometimes even lawyers and historians fail to see it. Legal rules helped make class-based interracial organizing difficult in labor history. Judges developed doctrines that made it hard for workers to organize and strike and prevented states from giving workers effective protection in

† Professor, University of Miami School of Law. This Article continues the exchange in the ClassCrits Symposium in the *Buffalo Law Review*. 56 BUFF. L. REV. 859 (2008). Thanks to Martha McCluskey and Athena Mutua for organizing the ClassCrits meetings and moving this work forward, to Susan Carle, Stephanie Wildman, Joan Mahoney, Martha McCluskey, Jim Pope, and George Schatzki for comments; to participants in the University of Miami School of Law faculty workshop; and to Max Nelson, Kathy Ahn, Sara Mantin, and Nyana Miller for research assistance. I am also grateful to Ken Casebeer for his suggestions on this Article and for the many ways his work helps mine.

1. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 1 (1999).

2. BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY xl (2001); *see* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, at 700 (Free Press 1998) (1935) (discussing the “public and psychological wage” of white privilege).

joining unions.³ Courts struck down most attempts by legislators to enact labor-protective regulation.⁴ The rules that made interracial work difficult went beyond the direct regulation of labor. Judges also limited or struck down Reconstruction civil rights statutes that should have protected equality.⁵ Taken together, these decisions fostered racial division, promoted insecurity among workers, and placed burdens on class-based organizing. This Article will explore the role of law in the history of race and labor.⁶

In many theories of class, solidarity among workers appears as an actual or potential unifying interest. The term “class” includes more than identification of the position in society of an individual or group. Class involves the work people do; the understandings they form about themselves, their lives, and the people with whom they live

3. See generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

4. *Id.*

5. See, e.g., *Hodges v. United States*, 203 U.S. 1 (1906) (reversing convictions of white defendants who attacked a sawmill to drive black workers from their jobs and holding that the Civil Rights Act of 1866 did not reach private conspiracies to deprive African Americans of work because of their race), overruled by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 unconstitutional).

6. This Article is the third piece in a series on race and class in American law. The first was a Comment on an interracial organizing drive led by African American workers in Greensboro, North Carolina in the 1990s. It explored questions about the representation of white working class interest in history and in contemporary voting rights cases. Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747 (2000) [hereinafter Mahoney, *Constructing Solidarity*]. The second Article explored theoretical concepts of class and status in American law, analyzing assumptions about class that shaped legal doctrine in cases on race, including affirmative action and voting rights. Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 817-27 (2003) [hereinafter Mahoney, *Class and Status*] (describing class-based solidarity as a *natural* interest of workers in Marxist and left Weberian theory and a *potential* interest in Pierre Bourdieu’s analysis of social groups as contingent and formed through struggle). “[O]ne cannot group just *anyone* with *anyone* while ignoring the fundamental differences, particularly economic and cultural ones. But this never entirely excludes the possibility of organizing agents in accordance with other principles of division” Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 THEORY & SOCY 723, 726 (1985).

and work; economic and social relations between groups; and the actions they take to pursue their interests.⁷

The vocabulary of American law is not easily adapted to discussing class. Legal doctrine involves categories such as poverty, labor, employee, and race that do not capture class relationships consistently.⁸ People define their interests and pursue them in both labor organization and community organization.⁹ The lived experience of class activism may seem distant from “institutions and institutional rules,”¹⁰ but those rules affect class formation through direct or indirect impact on experience, relationships, and culture.

Legal rules on both labor and race facilitated racial discrimination and repressed shared organizing. While many economic and social forces affected interracial organizing, the ideology of white supremacy treated privilege and oppression as reflections of a natural order,

7. The relationship between how people understand their situations and how they act moves in both directions: action affects consciousness, and consciousness affects action. E.P. Thompson described class as a *happening*, not a thing. E. P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 10 (1964). Quoting Thompson, Ira Katznelson described the relationship between class and consciousness: “Class formations . . . arise at the intersection of determination and self-activity: the working class ‘made itself as much as it was made.’ We cannot put ‘class’ here and ‘class consciousness’ there, as two separate entities, the one sequential upon the other, since both must be taken together—the experience of determination, and the ‘handling’ of this in conscious ways. Nor can we deduce class from a static ‘section’ (since it is a *becoming* over time), nor as a function of a mode of production, since class formations and class consciousness (while subject to determinate pressures) eventuate in an open-ended process of *relationship*—of struggle with other classes—over time.” Ira Katznelson, *Working Class Formation: Constructing Cases and Comparisons*, in WORKING CLASS FORMATION: NINETEENTH-CENTURY PATTERNS IN WESTERN EUROPE AND THE UNITED STATES 3, 8 (Ira Katznelson & Aristide R. Zolberg eds., 1986) (quoting E.P. THOMPSON, *The Poverty of Theory*, in THE POVERTY OF THEORY & OTHER ESSAYS, 193, 298 (1978)).

8. See Mahoney, *Class and Status*, *supra* note 6, at 842-46.

9. See Katznelson, *supra* note 7, at 14. Katznelson distinguishes structural analysis of capitalist development from the organization of society “lived by actual people in real social formations.” *Id.* at 15-16. Class means “formed groups, sharing dispositions,” and it also refers to the collective actions that are taken by those groups. *Id.* at 17. Katznelson draws these theoretical frameworks in order to avoid treating class actions as inauthentic because they do not follow a theoretical hierarchy of authenticity.

10. KOUSSE, *supra* note 1, at 1.

and the impact of racial hierarchy affected class mobilization. Background rules helped run a system of inequality without acknowledging the importance of state power to social outcomes.

Two quotes from historians begin this Article with very different views of racial inequality. J. Morgan Kousser, a historian of the South and politics, argues that institutions and institutional rules—the lasting influence of slavery, and the rules and structures of law—are more important to race relations than customs, attitudes, ideas, or culture. Bruce Nelson, a labor historian, emphasizes the attachment of white workers to the “white supremacist cultural reflexes” of the larger society and to the “public and psychological wage” gained as they defined themselves through resistance to the African-American demand for equality.

In exploring the importance of legal rules on race to issues involving class, this Article is a limited defense of Kousser’s argument about the importance of institutional rules, rather than culture or attitudes, as the source of inequality. If we start with the position that culture and attitudes determine structural and legal outcomes, legal rules seem either inevitable or inconsequential.¹¹ But rules that shape the makeup of neighborhoods and workplaces also shape experience; experience affects organizing and consciousness; consciousness and organization are part of culture and part of the definition of political interests. When background rules are invisible or unnoticed, that regulatory structure seems unimportant. Culture appears to reproduce itself without law or to produce the law it needs. So Kousser is correct about the importance of institutional rules, but his formulation proposes a sharp line between rules and culture that is not in fact easy to draw.

Legal rules on race were important to the difficulties of developing class-conscious interracial organizing in the United States. Judicial rules made labor organizing difficult and discrimination easy. White workers formed concepts of

11. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004) (“[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”); *id.* at 47-52 (arguing that if major civil rights cases of the *Plessy* era had reached holdings in favor of civil rights claims, the decisions would have been unenforceable, dangerous for litigants, and inconsequential).

self-interest in a landscape which was not a vacuum but a set of substantial obstacles to solidarity. It was not a state of nature, either—at least some of the important obstacles to interracial organizing were products of legal rules. In that context, neither solidarity nor attachment to privilege was a natural development. The biggest obstacle was not simply a legislative omission, a failure to protect African Americans against exclusion from work, but constitutional opinions such as *Hodges v. United States* that barred Congress from providing that protection.¹² *Hodges* involved terrorism as well as deprivation of work. The decision made it impossible to reach both racial exclusion and the conspiracies among private actors that enforced it. Because the holding affected property as well as contract, it affected community life as well as work. As the rules on race, work, and property interacted over time, each private transaction appeared as an independent market interaction rather than the result of a judicial holding.

This Article therefore looks for the role of law and the impact of legal decisions in histories of work, race, and community. Race and class development happened within a large set of rules; some governed race, some governed collective organization; some governed the conditions of work or shaped the ability of the state to regulate at all. Legal rules shaped neighborhoods that in turn affected lived experience, psychology, and culture. Culture and identity affect legal interpretation, and their move into law has consequences. The historical legal structure of inequality

12. 203 U.S.1 (1906), *overruled by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Jones* directly confronted the core question of Congressional power, holding that “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” 392 U.S. at 440. The determination that Congress had made could not be held to be irrational. “For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its ‘burdens and disabilities’—included restraints upon ‘those fundamental rights which are the essence of civil freedom . . .’” *Id.* at 440. Although *Jones* distinguished a series of cases on the enforcement of racial covenants, *id.* at 417-20, the Court had to overrule *Hodges*: “The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself.” *Id.* at 441 n.78.

has continuing impact today on labor and class-based work, on civil rights and legal concepts of state responsibility, and even on the ways in which we think about law itself. The indirect and cumulative impact of a legal regime makes it more difficult to attribute causation to any single one of these laws for inequality, the difficulties of solidarity, or the persistence of segregation.¹³

Part I looks at the rules that made interracial organization difficult, with a focus on *Hodges*, which involved a dispute about work in rural Arkansas at the beginning of the twentieth century. By the time the Supreme Court overruled *Hodges* in the context of housing discrimination in 1968, its holding had affected both the labor movement and residential development for decades. Parts II and III look at work against racism and the persistence of racism in industrial settings, comparing studies of work, organization, class, and identity that reach varying conclusions. Drawing on sources with different perspectives, Part II looks at perceptions of class among black and white steel workers in two studies of Youngstown, Ohio, where legal rules moved workers apart residentially while they made intermittent progress toward equality at work. Part III compares three studies of race and class on the Los Angeles waterfront during the 1940s, emphasizing residential segregation as both a legal regime and a cultural

13. For a description of the way law is constitutive of conditions for struggle, see Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39, 45-46, noting that:

meanings and values are neither fixed, stable, unitary, nor consistent. Thus, for example, the ideas, interpretations, actions, and ways of operating that collectively represent a person's legal consciousness may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships or purposes). And to the extent that that consciousness is emergent in social practice and forged in and around situated events and interactions (a dispute with a neighbor, a criminal case, a plumber who seemed to work few hours but charged for many), a person may express, through words or actions, a multifaceted, contradictory, and variable legal consciousness.

Id; see also Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in CULTURE ANALYSIS, CULTURAL STUDIES, AND THE LAW 1, 13-14 (Austin Sarat & Jonathan Simon eds., 2003) (quoting Silbey, *supra*, and insisting on the importance of agency in cultural studies).

force that helped shape white identity. These complex histories included both work for equality and resistance to equality. The work for equality was not sufficiently powerful or widespread to stop discrimination and oppression, but it was dedicated, creative, and showed the possibility of change. The limits on its success help reveal the systemic role of law that required and enforced segregated development.

Part IV discusses the direct and indirect impact that legal rules had on solidarity. A different holding in *Hodges* could have made it illegal for unions to exclude workers on the basis of race. When courts struck down union initiatives that brought rapid inclusion of minorities, the slow pace of integration of leadership became a symbol of union unwillingness to change rather than an example of the conservative limitations of law. Finally, Part V explains that these questions are important in contemporary law. When the Supreme Court struck down programs designed to remedy the continuing effects of private discrimination, the Court did not acknowledge the relationship between inequality and its own interference with civil rights laws for decades. Instead, the Court applied a narrow vision of state responsibility and held that the state could not address use race to address “societal” discrimination. The role of institutions and institutional rules in constructing and excusing inequality is still contested and critically important today.

I. LAW, RACE, AND CLASS

Two possible but contradictory policies could be used [by the labor movement]: eliminate the Negro as a competitor by excluding him from the skilled trades either as an apprentice or as a worker, or take him in as an organized worker committed to the defense of a common standard of wages.¹⁴

C. Vann Woodward's well-known quotation posed a stark choice for the Southern labor movement between racial exclusion to avoid competition and inclusion for the common defense. This choice facing the labor movement reflected a legal scheme that gave white workers the option to choose exclusion. As workers organized, they found more

14. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1887-1913, at 229 (1951).

possibilities than Woodward had identified.¹⁵ Nonetheless, even when labor organizations did not exclude workers by race, the availability of exclusion as a choice affected both the direction of the labor movement and the challenges of interracial class-based organizing. The Court had created constitutional barriers against restraints on racial exclusion while it continued to strike down most legislation that protected labor.

Before the 1930s, legal rules made it extraordinarily difficult to organize unions, maintain organization, and strike. Thousands of labor injunctions banned picketing and broke strikes.¹⁶ When states passed statutes regulating the workplace and protecting the right to join unions, courts struck down those laws. "A complete list of labor laws invalidated from the 1880s through 1922 would run to roughly '300 separate statutes, bills, and ordinances whose constitutionality [was] successfully challenged in the courts.'"¹⁷ Many states passed statutes that legalized peaceful picketing, outlawed yellow-dog contracts in which workers promised not to join labor unions, sought procedural reforms such as jury trials in labor disputes, and limited equity jurisdiction. But judicial decisions struck down the majority of those labor-protective statutes as unconstitutional and narrowly construed most of the rest.¹⁸

At a practical level, legal obstacles made collective organization and action difficult. Union victories were difficult to consolidate. Interracial organizing had to overcome further vulnerability to division as well as the challenges imposed by the lack of legal protection for labor. As William Forbath has explained, legal obstacles also affected the strategy and ideology of the labor movement.¹⁹

15. Labor historian Leon Fink argues, "Accepting that Woodward's alternate poles of economic logic mark the long-term dilemma of the labor movement, one might question whether they describe the real options encountered at any particular moment in the late nineteenth century." LEON FINK, *WORKINGMEN'S DEMOCRACY* 170 (1985).

16. FORBATH, *supra* note 3, at 193-98 (estimating more than four thousand injunctions between 1880 and 1930).

17. *Id.* at 187 (quoting Lindley L. Clark, *Labor Laws that Have Been Declared Unconstitutional*, BULL. U.S. BUREAU LAB. STATISTICS No. 321, Nov. 1922, at 10).

18. *Id.* at 151-52.

19. See generally FORBATH, *supra* note 3.

Injunctions and judicial hostility to labor-friendly regulation pushed labor leaders toward voluntarism²⁰ and away from the political process and reliance on the state.

Legal decisions on race and civil rights also affected class consciousness and labor organizing. Congress passed the Civil Rights Act of 1866 under its power to enforce the Thirteenth Amendment. That historic statute gave every citizen the same rights as white citizens to make and enforce contracts, and to purchase, lease, hold, and convey property.²¹ In 1906, the Supreme Court held in *Hodges v. United States* that the Thirteenth Amendment did not give Congress power to reach discrimination by private actors

20. Voluntarism was the philosophy and strategy that committed labor to relying on its own resources rather than relying on the state for systemic reform and protection for labor. See, e.g., FORBATH, *supra* note 3, at 1-2 n.3.

. 21. The Thirteenth Amendment banned slavery and “involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted . . . within the United States . . .” and authorized Congress to enact legislation to enforce the amendment. U.S. CONST. amend. XIII.

The indictment in *Hodges* came under two provisions of the Civil Rights Act, both of which are important to civil rights enforcement today. Pamela S. Karlan, *Contracting the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. REV. 783, 786 n.18 (2005). The first of these statutes guaranteed civil rights:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rev. Stat. § 1977 (1874) (current version at 42 U.S.C. § 1981 (2006)).

The second statute punished concerted action to deprive people of those rights:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States.

Rev. Stat. § 5508 (1874) (current version at 18 U.S.C. § 241 (2006)).

except in situations of slavery or involuntary servitude.²² More than sixty years later in *Jones v. Mayer*, the Supreme Court finally held that the Civil Rights Act of 1866 barred private discrimination in the sale of property.²³ The intervening decades had seen the passage of the National Labor Relations Act and a wave of organizing that reached the highest percentage of union membership in United States history.²⁴ Steel mills had been built, organized, and begun to rust. Around urban neighborhoods, suburbs had spread by streetcars and sprawled further through cars and highways. Meanwhile, *Hodges* had protected the privilege of developers, lenders, homeowners, employers, workers, and unions to exclude African Americans from workplaces and neighborhoods.

Hodges involved an attack in August 1903 on a new sawmill in Poinsett County, Arkansas. The mill had hired eight African-American workers.²⁵ At least fifteen white men with guns and torches converged on the mill, demanding that the owner fire the workers²⁶ and threatening the workers if they did not leave.²⁷ The mill

22. 203 U.S. 1 (1906), *overruled* by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

23. 392 U.S. at 441-43 n.78 (overruling *Hodges* as inconsistent with the history and purpose of the Thirteenth Amendment).

24. Union membership reached its highest point at 25.4% of the workforce in 1954, with a total of 17,022,000 union members; the highest total number of union members was 22,809,000 in 1974. See MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10-11 (1989). For 2008, there were 16,100,000 union workers, at 12.4% of the workforce. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY: UNION MEMBERS IN 2008 (Jan. 28, 2009), <http://www.bls.gov/news.release/pdf/union2.pdf>.

25. See 203 U.S. at 2 (naming eight workers); see also JEANNIE M. WHAYNE, A NEW PLANTATION SOUTH: LAND, LABOR, AND FEDERAL FAVOR IN TWENTIETH CENTURY ARKANSAS 70 (1996) (describing attack at sawmill).

26. WHAYNE, *supra* note 25, at 50 (noting that fifteen were arrested and three of the fifteen later convicted); Hon. Gerald W. Heaney, *Tribute, Jacob Trieber: Lawyer, Politician, Judge*, 8 U. ARK. LITTLE ROCK L.J. 421, 442 (1985-86) (noting that there were "at least fifteen" whitecappers and that indictments were sought that fall against "fifteen of the whitecappers").

27. According to the indictment, the defendants appeared at the mill on August 17, 1903 and intimidated the black workers "with the purpose of compelling them by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of [the right and privilege of contracting for their labor],' in violation of sections 1977 and 5508 of

owner “went to [the] Justice of the Peace, . . . [who] ‘not only refused to help keep the peace, but joined the mob.’”²⁸ The mill owner then gave in and fired all the African-American workers.²⁹

This “whitecapping” attack was part of a wave of terrorism across the South that fell between the organizational periods of the Ku Klux Klan but involved similar nightriding and terror tactics.³⁰ Whitecapping reflected overall economic instability as well as racial hatred and competition.³¹ Attacks in nearby states in the same period attempted to move black citizens completely out of some counties in Texas and Mississippi.³²

In the months before the attack on the sawmill, whitecappers had posted notices on farms throughout Poinsett County warning all black residents to leave the county “or else” and simultaneously warning white planters

the Revised Statutes.” Karlan, *supra* note 21, at 786 (alteration in original) (quoting Transcript of Record at 4, *Hodes*, 203 U.S. 1 (No. 14 of Oct. 1905 Term)).

28. Heaney, *supra* note 26, at 442 (quoting ARKANSAS GAZETTE, Mar. 17, 1904); *see also* WHAYNE, *supra* note 25, at 50. The report about the justice of the peace joining the attack appeared in the newspaper during the trial, a year after the attack, and therefore was probably based on trial testimony.

29. Heaney, *supra* note 26, at 442.

30. WHAYNE, *supra* note 25, at 48 (describing whitecapping as “almost commonplace” across parts of the South during the expansion of the plantation system); Heaney, *supra* note 26, at 439 n.53 (describing whitecapping as a continuation of Klan activity during the period after the organization had been officially disbanded in 1868 and before it reorganized in 1915).

31. At the time, the African-American population in the area was increasing. Both white and black farmers were losing their land, and relatively few landowners remained stable across the ten year periods of the census. WHAYNE, *supra* note 25, at 72. Economic insecurity persisted over subsequent years. *Id.* at 47-56.

32. See, e.g., *Negroes Driven from Texas: Whitecaps Active and Cotton Planters Fear Crop Cannot Be Picked*, N.Y. TIMES, Aug. 4, 1904, at 7 (“If the exodus of negroes from the state continues there will not be enough labor to pick the immense cotton crop . . . the army of cotton pickers from other states has been cut off by the treatment of blacks, who are warned not to return.”). Some employers said that they could not get any workers because labor was scarce and whites would not work their jobs no matter how much they paid. *Texans Drive Out Negroes; Whitecappers in Orange County Active and Industries Suffer*, N.Y. TIMES, Aug. 9, 1904, at 1 (stating that white labor was not available even at high wages).

against selling to blacks. In neighboring Cross County, whitecappers had made similar attacks on black tenant farmers leasing land formerly held by white tenants.³³ The whitecappers burned down homes, crops, and a church. Two hundred black families fled the area. One source suggested that some black farmers had been lynched.³⁴ The planters who had leased to black tenants pooled funds and hired private detectives from Memphis to stop the whitecappers, but the lead detective was murdered in a confrontation defending a remaining black tenant.³⁵

The U.S. Attorney brought federal prosecutions against the whitecappers under the Civil Rights Act of 1866 in both the Cross County tenant farming case, *United States v. Morris*,³⁶ and the Poinsett County sawmill case that became *Hodges*.³⁷ The defendants challenged the constitutionality of the statute, but the district judge, Jacob Trieber,³⁸ ruled that the Thirteenth Amendment gave Congress the power to protect the right to earn a living:

That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of section 5508, Rev. St. U.S.³⁹

33. WHAYNE, *supra* note 25, at 49. These attacks became the basis for the prosecution in *United States v. Morris*, 125 F. 322, 322 (E.D. Ark. 1903).

34. WHAYNE, *supra* note 25, at 49 (citing Heaney, *supra* note 26, at 442).

35. WHAYNE, *supra* note 25, at 49.

36. 125 F. 322.

37. *Hodges v. United States*, 203 U.S. 1 (1906), *overruled by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The *Hodges* case was initially captioned *United States v. Maples*. Karlan, *supra* note 21, at 786.

38. For information on Judge Trieber, see Heaney, *supra* note 26, at 444-49.

39. *Morris*, 125 F. at 331. The opinion sustaining the indictment in *Morris* was the only opinion published by the district court in these cases. In *Jones v. Mayer*, the Supreme Court cited the holding in *Morris*, stating: "The only federal court (other than the Court of Appeals in this case) that has ever squarely confronted that question held that a wholly private conspiracy among white citizens to prevent a Negro from leasing a farm violated § 1982." 392 U.S. at 419.

Whitecapping cases were difficult to prosecute because the identity of assailants was hard to determine and victims feared further violence if they testified.⁴⁰ In the *Morris* case, the prosecuting attorney dismissed charges when witnesses had not provided sufficient evidence to support a conviction.⁴¹ In *Hodges*, the jury convicted three of the twelve defendants. Later in 1904, Judge Trieber, who had tried both cases, stated that there had been “no trouble to secure a righteous verdict.”⁴² Judge Trieber’s biographer found that the *Hodges* conviction had been “surprisingly well received by the Arkansas press and the public, and it appeared for a while that employment opportunities for blacks in Arkansas would be improved.”⁴³

Powerful lawyers represented the defendants. L.C. Going, who defended the whitecappers in both cases at trial and *Hodges* in the Supreme Court, had a very successful career.⁴⁴ He won election as prosecuting attorney for the district in 1904 and ran for re-election while representing the defendants on appeal to the Supreme Court.⁴⁵ James P. Clarke, a former governor of Arkansas who had just taken a seat in the United States Senate in March 1903, joined the legal team after the *Morris* decision.⁴⁶

40. Heaney, *supra* note 26, at 443 (citing press reports of the trial of whitecappers who attacked black tenants in a neighboring county in *Morris*).

41. Heaney, *supra* note 26, at 446; see also WHAYNE, *supra* note 25, at 50 (noting that the Cross County nightriders went free, although “the judge, the prosecutor, and many observers were convinced of their guilt,” because they had worn masks to hide their identities and produced alibi witnesses); Karlan, *supra* note 21, at 789-90 (discussing failure to get testimony that would support conviction in *Morris*).

42. Heaney, *supra* note 26, at 448 (quoting a letter from Judge Trieber to federal judge Thomas Jones of Alabama, who had recently tried a lynching case).

43. *Id.* at 448. But cf. BRENT J. AUCOIN, A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900-1910, at 27-30 (2007) (reporting criticism of the *Morris* decision and the *Hodges* prosecution in the *Arkansas Gazette*).

44. Going was an elected state attorney, state legislator, director of a bank, and at one point acting governor. WHAYNE, *supra* note 25, at 51.

45. *Id.*; Heaney, *supra* note 26, at 448-49 (explaining that the representation of *Hodges* defendants helped elect new state prosecuting attorney); Karlan, *supra* note 21, at 789 & n. 38.

46. See AUCOIN, *supra* note 43, at 27 (stating that Clarke “jumped at the chance to join the whitecappers’ legal team” after the *Morris* decision). James P.

In *Hodges*,⁴⁷ the Supreme Court held that the Thirteenth Amendment could not authorize federal protection of an equal right to contract against interference by private actors unless those actions amounted to slavery or involuntary servitude.⁴⁸ Justice Brewer's opinion relied on Webster's definition of slavery as "the state of entire subjection of one person to the will of another."⁴⁹ Even though "one of the disabilities of slavery, one of the *indicia* of its existence" was the inability to make or perform contracts, and even though the defendants had subjected the workers to their will in forcing them to leave their jobs, "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."⁵⁰ The only reference to intent ignored the question of denial of contract or property rights on the basis of race, asserting that "it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation."⁵¹

Justice Harlan dissented, joined by Justice Day.⁵² Harlan found the Court's decision "entirely too narrow, and . . . hostile to the freedom established by the supreme law of

Clarke appeared for the Appellants in the Supreme Court. Clarke had won election to the Senate in 2002. See *Senator Clarke of Arkansas Dies*, N.Y. TIMES, Oct. 2, 1916, at 1. Judge Trieber issued the decision sustaining the *Morris* indictment in October 1903. 125 F. at 322. When *Hodges* reached the Supreme Court in 1906, Clarke was still in his first term in the Senate.

47. *Hodges v. United States*, 203 U.S. 1, 1 (1906), *overruled* by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

48. *Id.* at 17. The opinion also noted that a slave was defined as "held in bondage to another" and servitude was "the state of voluntary or compulsive subjection to a master." *Id.* The meaning of the Amendment was "as clear as language can make it." *Id.* at 16. Congress was given power to enforce the prohibition on slavery and involuntary servitude. "All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation." *Id.* at 16.

49. *Id.*

50. *Id.* at 18.

51. *Id.* at 19; see Karlan, *supra* note 21, at 795-98.

52. *Hodges*, 203 U. S. at 21 (Harlan, J., dissenting).

the land.”⁵³ Because the Court had repeatedly sustained the constitutionality of the statute, the question was whether a conspiracy to prevent African-American citizens from disposing of their labor by contract on terms of their choice was a right or privilege created by, derived from, or dependent on the Constitution. Harlan answered that question by pointing to the *Civil Rights Cases*, in which the Court had held that the Thirteenth Amendment reached private conduct, had specifically listed the disability based on race to make and enforce contracts as one of the “incidents or badges of slavery” abolished by the Thirteenth Amendment, and had stated that Congress had power to pass legislation to eradicate all incidents of slavery that acted directly on individuals whether or not state action was involved.⁵⁴ Former decisions of the Court made it “impossible to sustain the view” adopted by the majority in *Hodges* that the United States could not reach and punish “a combination or conspiracy of individuals, albeit acting without the sanction of the state, . . . if the combination and conspiracy has for its object, by force, to prevent or burden the free exercise or enjoyment of a right or privilege created or secured by the Constitution” or federal law.⁵⁵

The facts in *Hodges* show the systemic nature of power even in the absence of official state action.⁵⁶ The justice of the peace turned on the sawmill owner to join the attack. Whites who wanted to rent land to blacks hired *private* detectives for help. *Hodges* had distinguished defense lawyers, one of whom was a sitting United States Senator.

53. *Id.* at 37. (“It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this Court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom.”).

54. *Id.* at 32. The Thirteenth Amendment had been applied to private actors the previous year in a peonage case. *Clyatt v. United States*, 197 U. S. 207 (1905).

55. *Hodges*, 203 U.S. at 34.

56. One of the issues in *Jones v. Mayer* was whether Congress intended the word “custom” in the Civil Rights Act to cover private actors. 392 U.S. 409, 423-26 (1968). The Court did not discuss custom in *Hodges*, but the facts surrounding the attack at the sawmill showed that “custom” could be invested with power and intertwined with local authority without involving formal state action.

The violent deprivation of paid work invoked core disabilities of slavery even though it did not involve subjugation in coerced labor.⁵⁷

If Hodges and the other whitecappers had lost on appeal, the decisions would have strengthened black workers and the employers who wanted to hire them. It would also have supported the whites who opposed terror and were willing to convict Hodges.⁵⁸ In the fall of 1906, there were bloody race riots, but after *Hodges* the federal government would no longer intervene.⁵⁹ Whitecapping persisted and violence increased.⁶⁰ The Klan reorganized in 1915.⁶¹ “[F]or almost fifty years, the [Hodges] case became the rod and the staff of those who denied that the federal

57. The legislative history of the Civil Rights Act shows that Congress intended to cover conspiracies of planters to force freedmen to work at wages set by former masters to deny the freedom to choose their own work without the consent of a master. Gerhard Casper, *Jones v. Mayer: Clio Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 115 (quoting Reps. Windom and Trumbull); *id.* at 126 (finding that the legislative history supported Justice Bradley's argument in the *Cruikshank* circuit opinion that a conspiracy of whites to deny a black man the ability to own land on account of his race would violate the Civil Rights Act). Although Casper criticized the treatment of legislative history by both the majority and dissent in *Jones v. Mayer*, his review of that history persuaded him that *Hodges* had been wrongly decided. *Id.* at 127.

58. Three whitecappers had been convicted in Arkansas just before the Supreme Court decided *Hodges*; they had compelled African-American workers to leave their jobs at a lumber company by threatening to shoot them. These whitecappers were released immediately after the *Hodges* decision. AUCOIN, *supra* note 43, at 32. In *Boyett v. United States*, 207 U.S. 581 (1907), another whitecapping case from Arkansas, three defendants had their convictions reversed in reliance on *Hodges*. See Karlan, *supra* note 21, at 787. Prosecutors dropped charges against other defendants awaiting trial in Arkansas and Texas at the time of the *Hodges* decision. *Id.*

59. Heaney, *supra* note 26, at 449.

60. WHAYNE, *supra* note 25, at 51-53 (describing nightriding incidents). In 1909, Arkansas passed a statute banning nightriding. The law was used a few times against whitecappers; it was used at least as often against vigilante violence committed by whites against whites; and it was used at least once against a labor union. *Id.* at 52. In another neighboring county in 1913, white workers demanded that a lumber company fire all the black workers at a company that had replaced white workers with African Americans. NAN ELIZABETH WOODRUFF, AMERICAN CONGO: THE AFRICAN AMERICAN FREEDOM STRUGGLE IN THE DELTA 16 (2003).

61. Heaney, *supra* note 26, at 439 n.53.

government had the authority to intervene in race relations.”⁶²

Two recent essays describe *Hodges* as an example of wealthy whites defending profitable access to cheap black labor against attacks by working class whites.⁶³ That description is accurate but incomplete. Of the men who attacked the sawmill, most were farmers; only Reuben Hodges was a sawmill worker.⁶⁴ Whitecapping did involve economic competition, but wealthier whites sometimes participated in whitecapping.⁶⁵ Violence and control of labor were not only competition but part of the practice of white supremacy.

Also, white elites were divided.⁶⁶ Some planters and industrial employers wanted cheap black labor and feared

62. MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 1 (1994).

63. David E. Bernstein, *Thoughts on Hodges v. United States*, 85 B.U. L. REV. 811, 812 (2005); Karlan, *supra* note 21, at 786-87. Karlan quotes a letter to the Attorney General from the U.S. Attorney for the Eastern District of Arkansas, describing the whitecappers as “[a]n inferior class of white men feeling themselves unable to compete with colored tenants combined to drive them out of the country. The movement is denounced by all the respectable white element irrespective of party.” Karlan, *supra* note 21, at 785. Karlan concludes that prominent whites instigated the prosecutions to protect their economic interests and that “the race of the intimidated workers was simply a lever by which the ‘respectable white element’ sought to invoke federal power in its battle with ‘an inferior class of white men.’” *Id.* at 786-87. Bernstein agrees, stating that employers were protecting access to cheap labor by African-Americans in *Hodges* and arguing that “during the *Lochner* era, the interests of white industrialists and black workers often converged in opposition to the racially exclusionary policies and attitudes of working class whites.” Bernstein, *supra*, at 812. See *infra* text accompanying notes 263-67, discussing the effects of the “race to the bottom” on the wages of black and white workers.

64. Black and white farmers were losing land rapidly after 1900. The whitecappers may have hoped to get work in the new mill or generally to avoid economic competition from African Americans. WHAYNE, *supra* note 25, at 70.

65. In another Arkansas county around the same time, “[a] pitched battle between blacks and whites . . . led to the arrest of a band of whitecappers, some of whom were ‘prominent in the social and business affairs of the county.’” Whayne, *supra* note 25, at 47. The justice of the peace who “joined the mob” in *Hodges* was another example because he would not have been competing with black sawmill workers. Heaney, *supra* note 26, at 442.

66. See WHAYNE, *supra* note 25, at 51 for a discussion of divisions among elites. White elite support for federal intervention was a sign of “the lengths to which the social chaos prevalent in the Arkansas delta had driven them.” *Id.*

attacks on their farms and businesses. They tried to stop whitecapping attacks on black workers and tenant farmers,⁶⁷ and they supported prosecution in whitecapping cases.⁶⁸ Other white planters and farmers supported the effort to drive blacks out of the area.⁶⁹ Furthermore, planters who wanted cheap labor were not allies of black workers and tenant farmers. Some resisted whitecappers to protect their own interests, but the sawmill owner in *Hodges* complied with the demand to fire black workers.

The questions about class interest in *Hodges* raise issues explored in studies of race and labor history with varying emphases. The historians most concerned with psychological and cultural aspects of white privilege have focused on the racial attitudes of white workers rather than employers, while other historians emphasized the importance of interracial solidarity or of "bringing the employers back in."⁷⁰ Increasingly, historians have explored

67. See *Negroes Driven from Texas*, *supra* note 32.

68. See Karlan, *supra* note 21, at 785-90.

69. WHAYNE, *supra* note 25, at 51. L.C. Going, *Hodges*' lawyer, had ties to "planters on the delta and farmers on the ridge and in the prairie," and the case helped his career. *Id.*

70. W.E.B. Du Bois wrote about the attachment of white workers to privilege and its destructive impact. *See generally* DU BOIS, *supra* note 2. The literature on white privilege and labor history expanded rapidly during and after the 1990s. *See, e.g.*, NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1996); NELSON, *supra* note 2, at x1; DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991). Much of this literature was written from disappointment with the failure of Marxist concepts of "class" to provide an effective end to racial division, or, more directly, "written in reaction to the appalling extent to which white male workers voted for Reaganism in the 1980s." ROEDIGER, *supra*, at 187-88; cf. Eric Arnesen, *Whiteness and the Historians' Imagination*, 60 INT'L LAB. & WORKING-CLASS HIST. 3 (2001) (criticizing overreliance on theories of whiteness and advocating better archival work by historians).

Brian Kelly argues that the new social histories of labor tended to dismiss the other major part of Du Bois's argument about racism—the part that described these divisions as "carefully planned" by employers. BRIAN KELLY, RACE, CLASS AND POWER IN THE ALABAMA COALFIELD, 1908-21, at 9 (2001) (arguing for "bringing the employers back in"). *See generally id.* at 1-15 (overview of debates in race and labor history and the evidence from Alabama), 108-131 (on white supremacy and white working class interracialism); DANIEL LETWIN, THE CHALLENGE OF INTERRACIAL UNIONISM: ALABAMA COAL MINERS, 1878-1921, at 6 (1998) (describing renewals of challenges to the hardening system of segregation with each round of organizing, support from the labor

the agency of black workers within the labor movement as well as outside it.⁷¹ Of the many studies exploring race and labor in different settings and periods, some described a nuanced history in which labor activism moved between exclusion and interracial organization.⁷² Even in the Jim Crow South, some interracial and biracial organizing took place despite with legal penalties and private terrorism.⁷³

Arkansas had seen some countercurrents of resistance that are not visible in the story of the *Hodges* case. Nine years before the attack on the sawmill, the Arkansas People's Party had "the clearest record of racial liberalism of any of the Southern third parties[,]" with a platform that explicitly included advocacy for "the downtrodden,

press for interracial organizing, and the Jim Crow order as a powerful constraint on solidarity).

71. Eric Arnesen criticize the one-sided focus on either racism or egalitarianism in labor union activities: "Agency is bestowed on white workers, while African Americans' own responses and strategies are treated as if they were of secondary or even minimal importance. Yet black workers were themselves genuine actors, even when negotiating extremely difficult terrain. Try as they might, white workers did not always get exactly what they wanted. . . ." Eric Arnesen, *Up from Exclusion: Black and White Workers, Race, and the State of Labor History*, 26 REV. AM. HIST. 146, 150 (1998) [hereinafter Arnesen, *Up from Exclusion*]; see also ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 3-4 (2001) [hereinafter ARNESEN, BROTHERHOODS]; ERIC ARNESEN, WATERFRONT WORKERS OF NEW ORLEANS: RACE, CLASS AND POLITICS, 1863-1923, at viii-ix (1991) [hereinafter ARNESEN, WATERFRONT].

72. For example, Michael Honey's history of Memphis workers tells a complicated story, revealing both a consistent pattern of oppression of black workers, and countercurrents of interracial organizing and racial interactions that shifted over time. See MICHAEL K. HONEY, SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS 14-20 (1993). White workers learned that biracial organizing was important for their own well being, though they often continued to defend the general system of white privilege and individual attitudes changed slowly. Industrial unionism created a new generation of activists and leaders in the black community's battle against segregation. Biracial organizing and structures brought important gains, including effective union organization and more equality in seniority systems, though biracial leadership was weakened by the cold war. *Id.* at 285-87.

73. See, e.g., ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 66-67, 70 (1990); KELLY, *supra* note 70, at 110-11; LETWIN, *supra* note 70, at 90.

regardless of race.”⁷⁴ Nearby Lee County elected a populist official in the 1880s and experienced a strike by cotton pickers in 1891.⁷⁵

Thirty years after the *Hedges* decision, the founding meeting of the Southern Tenant Farmers Union (STFU) took place in Poinsett County.⁷⁶ By the 1930s, conditions had changed. New Deal relief flowed to landowners rather than sharecroppers or tenant farmers, and evictions increased.⁷⁷ Planters were discharging both whites and blacks.⁷⁸ Eighteen men—eleven white and seven African American—met to found the organization; both whites and blacks spoke to the need for an integrated union.⁷⁹ A white farmer “rose to the question and, admitting that his own father had been a Ku Klux Klan member who had helped drive black Republicans from Crittenden County in the 1890s, insisted that black and white tenants and sharecroppers had to stand together.”⁸⁰ A black

74. LAWRENCE C. GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA 298 (1976).

75. Populist candidates ran close races against Democratic candidates across Arkansas in 1888. See Lee County, Encyclopedia of Arkansas History and Culture, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=783> (last visited Oct. 7, 2009) (recounting history). Cotton pickers threatened to strike in 1891 but the strike was only carried out in Lee County. *Id.*

76. See WHAYNE, *supra* note 25, at 198.

77. See Alex Lichtenstein, *The Southern Tenant's Farmer's Union: A Movement for Social Emancipation*, Introduction to HOWARD KESTER, REVOLT AMONG THE SHARECROPPERS, 15, intro. 30-31 (Univ. of Tenn. Press 1997) (1936) (describing AAA program that caused evictions to increase); *id.* intro. 32 (describing complete suppression and disappearance of report that documented conditions in Arkansas including “pilfered AAA payments”); see also KESTER, *supra*, at 27-33 (describing process in which AAA payments for crop reduction went to landlords; tenants should have received payments but did not; tenants should have lived without rent on lands for which government had paid compensation but were charged rent or evicted by landlords).

78. WHAYNE, *supra* note 25, at 199 (describing evictions and diminishing income for black and white tenants and sharecroppers); *id.* at 217 (concluding that interracial organizing succeeded in part because planters were evicting without regard to race and in part because blacks were a declining percentage of the county population, increasingly impoverished, and less threatening as competition for whites).

79. *Id.* at 198-99.

80. *Id.* at 198.

sharecropper had survived a bloody race riot and the destruction of an all-black farmers' union in Elaine, Arkansas in 1919; he spoke to the need to work together and the danger that planters would divide blacks and whites by exploiting racism.⁸¹ The union worked on an interracial basis, and locals were interracial in most areas.⁸²

Hodges has been overlooked as a labor case and fallen out of the canon of important race cases.⁸³ Charles Hamilton Houston saw *Hodges* as a major obstacle to equality and a high priority for NAACP litigation.⁸⁴ Two constitutional

81. *Id.* He said, "For a long time now, the white folks and the colored folks have been fighting each other and both of us have been getting whipped all the time. We don't got nothing against one another but we got plenty against the landlord." He concluded with a powerful call for unity: "The same chain that holds my people holds your people too. If we are chained together on the outside we ought to stay chained together in the union." KESTER, *supra* note 77, at 56. For details of the Elaine massacre, see WOODRUFF, *supra* note 60, at 74-109.

82. In Marked Tree, Arkansas, the union began with separate locals for blacks and whites; the locals grew together after whites were invited to join meetings of the black local. Lichtenstein, *supra* note 77, intro. 35-36; *see also* DONALD H. GRUBBS, CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS' UNION AND THE NEW DEAL 66-68 (2000) (describing separate organization in Marked Tree and increasingly shared work); WOODRUFF, *supra* note 60, at 163. Lichtenstein describes "the union's racial egalitarianism [as] far more radical than its initial economic program"; rather than merely rearranging social relations, "in bringing the 'disinherited' of both races together, the STFU sought to overturn the entire southern economic and political structure of which racism was an integral part." Lichtenstein, *supra* note 77, intro. 33.

83. The lack of interest in *Hodges* among labor historians is particularly surprising because most will have read Herbert Hill, who treated *Hodges* as critically important in narrowing the interpretation of "badges and incidents" of slavery and limiting Congressional power to situations involving slavery. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 74 (1977).

84. RISA LAUREN GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 215-16 (2007) [hereinafter GOLUBOFF, LOST PROMISE]; Risa Lauren Goluboff, "*Let Economic Inequality Take Care of Itself*: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s," 52 UCLA L. REV. 1393 (2005) [hereinafter Goluboff, Economic Inequality] (describing changes over time in NAACP focus on labor litigation). Houston sought more than an end to formal discrimination in unions and employment:

Houston was convinced that 'keeping a man down to certain limited jobs in restricted places is nothing but a refined form of involuntary servitude and . . . lawyers must keep digging until they find a way to make the United States Supreme Court change [the] view it took in *Hodges*.' Houston's concerns . . . went to the very heart of constitutional

historians considered the case more harmful to African Americans than *Plessy v. Ferguson*.⁸⁵ The *Hedges* decision affected all workers and all African Americans. Overruling *Hedges* in *Jones v. Mayer* could not undo the generations of harm it had already wrought or the lessons that people had drawn from jobs and neighborhoods that had been shaped under rules that followed *Hedges*. The next part describes the strengths and weaknesses of organizing for equality among steelworkers in Youngstown while racial discrimination was legal for decades and residential segregation increased.

II. RACES AND CLASS: TWO VIEWS OF YOUNGSTOWN

This part compares findings from two studies of class and race among steelworkers in Youngstown, Ohio.⁸⁶ Robert Bruno emphasized how class “works,” finding strong working class values of collectivity, equality, mutual cooperation, and personal dignity. Race “often strained, even if it never broke, the class dimensions of industrial

protection for African Americans’ rights to work. The target was not Plessy but Hodes.

Goluboff, *Economic Inequality*, *supra*, at 1455.

85. AUCOIN, *supra* note 43, at 33 (“*Plessy* was outdistanced in 1906 by the even more constraining Supreme Court decision in *Hedges v. United States*’ which ‘all but completed the federal judiciary’s dilution of Reconstruction.’” (quoting HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 501 (1982) and citing *Plessy v. Ferguson*, 163 U.S. 537 (1896))). Although Houston emphasized the importance of labor cases, the NAACP moved away from work cases in the 1940s and came together around the school cases. Goluboff, *Economic Inequality*, *supra* note 84, at 1427-35 (moving away from labor cases toward focus on desegregation); *id.* at 1435-42 (using right-to-work arguments to integrate unions while defending rights to organize in *James v. Marinship*); *id.* at 1450 (analogizing unions to innkeepers and common carriers); *id.* at 1472 (describing Charles Hamilton Houston’s emphasis on the importance of blue-collar workers); *id.* at 1473-86 (consolidation on challenge to state action).

86. See ROBERT BRUNO, *STEELWORKER ALLEY: HOW CLASS WORKS IN YOUNGSTOWN* (1999); NELSON, *supra* note 2, at 251-87. Nelson discusses steelworkers’ race, and organizing in chapters four through six. Both authors began their studies in the late 1980s. BRUNO, *supra*, at 6-7; NELSON, *supra* note 2, at xix-xx. Both had personal experience of working class life. BRUNO, *supra*, at 1-2, 16-17; NELSON, *supra* note 2, at xxii (stating that he returned to graduate school “after nearly a decade on the shop floor”).

production.”⁸⁷ Bruce Nelson, focusing on the struggle for black equality, found that when black workers organized they sometimes found white allies but “more commonly . . . encountered various forms of resistance.”⁸⁸ Nelson concluded that “working-class agency often meant both grassroots initiatives to achieve racial equality and determined rank-and-file defense of the wages of whiteness” and that there was no “escaping the basic fact that ‘class is lived through race and gender.’”⁸⁹

Bruno, a sociologist and the son of a Youngstown steelworker,⁹⁰ interviewed seventy-five retired steelworkers about their experience in the Youngstown mills and surrounding communities.⁹¹ He chose “workers who were not likely to be the most obviously class conscious,” not “union officials or known ‘radicals.’”⁹² Their life experiences matched Ira Katznelson’s concept that “class” encompasses economic structure, ways of life, worker dispositions, and collective action.⁹³ Workers were conscious of ongoing battles with management whose interests opposed theirs in fundamental ways; there was companionship among steelworkers outside the mill and shared identification with other steelworkers.⁹⁴

“[W]orkers were workers in spite of racial identity. The job required coordination, and workers were quick to appreciate the need to cooperate.”⁹⁵ Despite racial bigotry, black and white workers shared the belief that the steel

87. BRUNO, *supra* note 86, at 72 (discussing race and class); *id.* at 162 (describing working class consciousness and values in *Youngstown*).

88. NELSON, *supra* note 2, at 286.

89. *Id.* at 254 (noting resistance from white rank-and-file); *id.* at 293 (arguing that class is lived through race and gender).

90. BRUNO, *supra* note 86, at 2.

91. *Id.* at 10. Twenty-three percent of his subjects were black or Hispanic, approximately the same percentage that worked in the one steel mill from which records on the early 1970s were available. *Id.* at 11. Twelve workers were African-American and five were Puerto-Rican. *Id.* at 172-75. Most of the whites were “of Italian or non-Anglo-European” descent. *Id.* at 11.

92. *Id.* at 12.

93. *Id.* at 15-16.

94. *Id.* at 160-64.

95. *Id.* at 54.

companies saw them only as “check numbers.”⁹⁶ All workers were likely to describe shared opposition to bosses who could be brutal and abusive.⁹⁷ Several white workers spoke of their common situations, and one described familial affection among workers.⁹⁸ Both black and white workers discussed shared interests and the importance of the union.⁹⁹ Some whites acknowledged that segregation had persisted until the government and the union took steps to end it.¹⁰⁰ Of the twelve black workers Bruno interviewed, two expressed the most anger about racism in the plant and the union,¹⁰¹ but these two workers still agreed that “[e]ven a color-bound union was a lot better than a profit driven company.”¹⁰² A third black worker criticized union racism but also thought both the union and the federal government had improved race relations.¹⁰³

Jobs were segregated before the passage of federal civil rights legislation in the 1960s.¹⁰⁴ Black workers were confined to the dirty and lowest paid work, advancing to better jobs “every now and then.”¹⁰⁵ When white workers resisted integration, “the union too often went along with blatantly discriminatory company policies.”¹⁰⁶ In the early 1970s, inclusive union politics “began to make a difference.”¹⁰⁷

Bruno reported “some disagreement between black workers and white workers about the extent of separation”

96. *Id.*

97. See, e.g., *id.* at 54-55, 74.

98. *Id.* at 53.

99. *Id.*

100. *Id.* at 186 n.14.

101. *Id.* at 54.

102. *Id.*

103. *Id.* at 186-87 n.14 (noting that, while he was “critical of union racism,” this worker “credited both the union and the federal government with the overall improvement in race relations”).

104. *Id.* at 72.

105. *Id.* at 72-73.

106. *Id.* at 72.

107. *Id.*

in the plants.¹⁰⁸ One black worker said white workers ate and kept their tools separately from black workers, but “most workers felt that the physical distance kept between races was minimal.”¹⁰⁹ Several whites emphasized that work was a place where workers knew each other, met, and talked; Bruno’s father reported that workers ate together.¹¹⁰ In one plant, the former local president recounted, there was a makeshift wall in the bathroom that stood through the 1940s, ostensibly for privacy but understood by workers to segregate blacks and whites.¹¹¹ The union president led white workers in tearing down the wall with sledge hammers.¹¹² Bruno’s focus on spatial separation sometimes elides the importance of white control of jobs.¹¹³ Although elite jobs still went to white workers, he says that “separation rarely added up to exclusion” because ultimately blacks and whites all worked together and could not avoid each other.¹¹⁴

Bruce Nelson is a historian educated at elite schools who worked for years in industrial labor before finishing graduate school.¹¹⁵ He wrote *Divided We Stand* after he came to question his own fundamental belief that “where conditions were favorable, and the right leadership was in place, ‘class’ would triumph over ‘race.’”¹¹⁶ He emphasized the struggle of black workers against subordination and the agency of white workers in creating racial segmentation, as well as the role of organized labor in mediating interracial conflict or institutionalizing inequality.¹¹⁷ Nelson noted the

108. *Id.* at 187 n.22.

109. *Id.*

110. *Id.* at 54. Bruno’s father also said there was no place inside the plant to be separated. *Id.*

111. *Id.* at 187 n.22.

112. *Id.* Bruce Nelson repeats the story about tearing down the wall but states that it may be apocryphal. NELSON, *supra* note 2, at 269-70.

113. See, e.g., BRUNO, *supra* note 83, at 73 (“[I]t was very common for unskilled laborers of different nationalities and races to be preparing an area for skilled workers of primarily one ethnic group.”).

114. *Id.* at 73.

115. NELSON, *supra* note 2, at xxi-xxii.

116. *Id.* at xxii-xxiii.

117. See, e.g., *id.* at xxv, 147.

power of capital but emphasized the role of white workers in subordinating African Americans.¹¹⁸ He agreed with James Barrett and David Roediger that European immigrants began as “inbetween peoples”¹¹⁹ gradually distinguishing themselves from African Americans, climbing the hierarchy of status in America and “becoming white.”¹²⁰

In Youngstown, the Brier Hill neighborhood of Italian and other European immigrants included African Americans in the 1930s.¹²¹ An Italian steelworker remembered a “mixed neighborhood [where] we all got along well,’ where ‘you never had to lock your doors.’”¹²² In contrast, a black worker remembered ethnic tension in a “melting pot that never melted.”¹²³ Racial prejudice increased when black workers generally did not join the Little Steel strike in 1937.¹²⁴

Inside the steel plants, black workers were confined to the most difficult, dangerous, and marginal jobs.¹²⁵ Racial segregation persisted, even though local leaders in some plants organized against discrimination.¹²⁶ Black workers changed their clothes and ate their meals separately from white workers.¹²⁷

Interracial organizing against discrimination had some successes but also encountered resistance from white workers.¹²⁸ In the late 1940s, a group of black and white union members, including a local president, challenged segregation within the mill and the inequality built into the seniority system that confined black workers to the worst

118. See *id.* at xxvi (noting employer control of enterprises).

119. See NELSON, *supra* note 2, at 45, 146, 159; James R. Barrett & David Roediger, *Inbetween Peoples: Race, Nationality and the “New Immigrant” Working Class*, J. AM. ETHNIC HIST., Spring 1997, at 3.

120. NELSON, *supra* note 2, at 20, 24, 144, 146.

121. *Id.* at 256.

122. *Id.* at 257.

123. *Id.*

124. *Id.*

125. *Id.* at 257-58.

126. See, e.g., *id.* at 262-63.

127. *Id.* at 287.

128. *Id.* at 260.

job tracks.¹²⁹ They won an agreement to open lines of advancement for black workers. (Nelson does not address the background labor law here, but workers relied implicitly on legal protection for the union when they negotiated changes in segregation.) Yet white resistance continued and sometimes led to wildcat strikes.¹³⁰ Black workers who gained access to higher paying jobs faced resistance that ranged from refusal to provide training to death threats, such as throwing open oven doors to shoot forth flames that could kill a man on the floor.¹³¹ These threats were powerful deterrents to job integration.¹³²

Radical leadership made a significant difference in attitudes on race in the mill and in community struggles.¹³³ Local union leadership included political radicals¹³⁴ who were committed to civil rights.¹³⁵ During the 1940s, they led union members to oppose police brutality, integrate a swimming pool, and take action against discrimination in food service when union members traveled to a state convention.¹³⁶ However, support for black workers from national union leadership was at best uneven and often absent. In the 1950s, when whites divided along ethnic lines, black union members organized a caucus that won several local offices.¹³⁷ Whites then organized along racial lines, and their threats against black workers increased.¹³⁸

The studies agree that black and whites did not usually socialize outside the workplace.¹³⁹ Nelson emphasized the

129. *Id.*

130. *Id.* at 260-61.

131. *Id.* at 261.

132. *Id.* (quoting a union official who stated that the first man to upgrade to a better job in 1948 quit the new job almost immediately because "he was convinced that he would be killed").

133. *Id.* at 262.

134. *Id.* at 261-62 (discussing radicalism of local union leaders).

135. *Id.* at 262-65.

136. *Id.* at 264.

137. *Id.* at 213.

138. *Id.*

139. *Id.* at 274. A black worker told Nelson that whites could be friendly at work but unwilling to speak when they encountered black workers downtown. Bruno reported that some blacks and some whites met socially but that lack of

importance of residential segregation and separate social worlds for black and white workers.¹⁴⁰ Bruno found that white workers remembered black classmates and friends in postwar neighborhoods, consistent with memories reported by black workers for the years before the government began providing home loans on a discriminatory basis.¹⁴¹ Bruno attributed increasing segregation to institutional factors.¹⁴² After the 1940s, “[b]ank lending policies left black workers behind in what were once integrated neighborhoods.”¹⁴³ Black workers who could not get loans from banks in Youngstown went as far as Pittsburgh for home loans, or they bought on installment contracts when they could not get mortgages.¹⁴⁴

For both authors, law appears only as an intervention in the existing system of job segregation, not the background rule that helped create the system, but their conclusions about effectiveness of legal intervention varied. In both studies, white workers resisted the integration of jobs, but Bruno emphasized change over time while Nelson emphasized the importance of resistance.¹⁴⁵ Bruno found that the affirmative action Consent Decree in steel stopped the ghettoization of jobs;¹⁴⁶ Nelson reported that the Consent Decree was fiercely contentious, followed by white

social interaction was more typical. BRUNO, *supra* note 86, at 53. A black worker said that whites were not “race haters,” but that he did not see his white friends when he left the plant. *Id.* at 54.

140. Nelson describes residential segregation as a choice that is part of a continuing phenomenon of “separate worlds” in work and social life. NELSON, *supra* note 2, at 274. (“Even in the 1950s, blacks and whites continued to occupy separate worlds,” with “segregated neighborhoods, separate churches and taverns, and segmented occupations in the steel mills.”).

141. BRUNO, *supra* note 86, at 35.

142. “Pre-middle income neighborhoods” had been more racially integrated than racially mixed. *Id.* at 33.

143. *Id.*

144. *Id.* Years later, black workers still expressed resentment at the banks’ refusal to lend money for moves to the suburbs. *Id.* at 33-34.

145. A progressive union leader told Staughton and Alice Lynd, “[S]omehow, the same people who harassed the blacks in the Truman and Eisenhower years, under Kennedy their sense was to do the decent thing, accept it, and not struggle at all. Our department was desegregated and blacks moved into all the jobs. I didn’t hear any complaints at all.” *Id.* at 72.

146. *Id.* at 72.

refusals to train black workers¹⁴⁷ that resembled resistance to job integration in the 1940s.¹⁴⁸ A black worker told Bruno that civil rights laws changed behavior inside the plants.¹⁴⁹ Previously, the union had gone along with discriminatory company policies when white workers resisted working with black men.¹⁵⁰ By the early 1970s, “successful efforts at inclusive union politics began to make a difference” and the union began to represent minority workers better.¹⁵¹ Nelson concluded that the racialized division of labor was mostly constructed by management, but white workers developed a stake in continuing that division.¹⁵² Although white union leaders described successful work in support of job integration,¹⁵³ that work did not succeed in ending white resistance.

Nelson was writing against his former belief that class as a unifying force could overcome racism, and disappointment became a component in his criticism of injustice. In contrast, Bruno wrote from appreciation of the world in which he grew up and confidence in its egalitarian values. Bruno’s interview questions did not make direct inquiries about race, asking instead about solidarity and division, community strength and weakness.¹⁵⁴ Some of the differences between their findings also reflect the differences in workers they chose to interview and the roles of these workers in the union.¹⁵⁵ Bruno’s decision to

147. NELSON, *supra* note 2, at 280-86.

148. *Id.* at 283.

149. *Id.* at 186-87 n.14

150. BRUNO, *supra* note 86, at 72.

151. *Id.*

152. NELSON, *supra* note 2, at 280-86.

153. *Id.* at 258-60.

154. The thirty questions Bruno took into each interview do not mention race directly. BRUNO, *supra* note 86, at 169-70. The topics closest to race appear in question 6, “How did the company try to weaken the solidarity of the workers?”; question 14, “What do you believe most united workers? What most tore them apart? How were workers united outside of the plant?”; question 15, “What were the attitudes, beliefs, goals, or acts that hurt the cause of the local working class?”; and perhaps question 16, “What made your community strong? What made it weak?” *Id.*

155. Perceptions about race are shaped by the standpoints of the people involved. See, e.g., RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE

interview few leaders or activists might have reduced the number of white workers willing to explore questions of racism.¹⁵⁶

The difference in interview subjects can be important because workers may not know the same truths. The union could have brought white workers the most integrated and egalitarian situation in their lives, even while whites continued to benefit from job segregation. Furthermore, white workers might not all share knowledge of potentially lethal aggression by other workers.¹⁵⁷ In contrast, for black workers, awareness of white hostility and resistance had to be part of survival in the plants. Exclusion, threats, and resistance could reach black workers effectively even if some whites did not participate. White refusals to train could change a black worker's future. Lethal threats were dangerous even if only some of the white workers made them; for black workers, awareness of danger would be part of self-defense.

Bruno's concept of class involves social ties between workers who took care of each other within the community.¹⁵⁸ Class ties were forged through hardship that could not be solved individually; working class life developed as workers moved back and forth between plant and home.¹⁵⁹ They lived close together, which brought intimate contact. At their best moments in Youngstown, the working class "practiced a form of human interaction conducive to building a more equitable and just society. They valued cooperation, mutual aid, collective work, common needs, personal dignity, and equality of

SOCIAL CONSTRUCTION OF WHITENESS 1 (1993); Mahoney, *Class and Status*, *supra* note 6, at 805-06.

156. The omission of questions about race could reinforce the evasion of direct discussion of race and power among white workers. Whites seldom feel collectively responsible for racist acts of other whites. Mahoney, *Class and Status*, *supra* note 6, at 807-11.

157. The most aggressive workers might repeat the common justification for exclusion that black workers "can't take the heat," NELSON, *supra* note 2, at 288, but might not admit to attempted murder.

158. BRUNO, *supra* note 86, at 161.

159. *Id.* at 53 (hardship basis of attachments); *id.* at 161 ("At all hours of the day workers went undramatically from home to plant and from plant to home. Each time they persistently moved back and forth over familiar ground, workers took with them a bit of family, community, and work.").

condition.”¹⁶⁰ Neighbors were cognizant of each others’ needs and mutually supportive, usually without being asked. “A selfish act of individualism was the inglorious badge of a ‘scab’ What steelworkers expressed through their relationships was nothing less than a nonexploitive way to live.”¹⁶¹ To the extent that Bruno’s working class norms were based on practices in communities, white working class experience may have been the baseline because neighborhood ties would have been less likely to extend to black workers.

Nelson rejects shared economic interest as a sufficient basis for uniting workers. “Given the ways in which race is encoded in working-class identities and definitions of self, there can be no economicistic cure for the malady that is ‘whiteness.’”¹⁶² It is easy to agree that, standing alone, economic self-interest would not “cure” attachment to white privilege. Economic self-interest for white workers could be defined either to include or exclude shared organization with black workers. But Nelson does not identify another “cure” that could have been sustained, and he does not assess the possibility of change.

Cure and malady imply disease, probably psychological. Which direction should labor take to move toward that cure? The disease model can be extraordinarily helpful. In a foundational article on critical race theory, Charles Lawrence urged us all to see racism as a public health problem that infects everyone in America, without suggesting that everyone is affected the same way.¹⁶³ This approach opens a rich scope for action for white people to find alliances and at the same time confront unconscious bias. On the other hand, Nelson’s description of whiteness as “encoded in working-class identities and definitions of self” implies, without evidence and probably unintentionally, a negative comparison to the identities of other classes.

More importantly, the view of race as fixed (encoded and defined) misses the countless interactions in many

160. *Id.* at 162.

161. *Id.* at 162.

162. NELSON, *supra* note 2, at 293.

163. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-31 (1987).

spheres of life through which racial bias is produced and reproduced. Nelson's disappointment is understandable, but it is accompanied by at least two problematic assumptions. Psychological and cultural explanations for the persistence of the ideology of white supremacy can easily miss the subject of this Article—the institutional rules and forces that promoted segregation and pushed back against any progressive racial change workers could achieve through economic unity. As a consequence, disappointment in the potential cure for economic “cure” for racism could diminish awareness of whatever gains *are* possible through shared struggles for economic goals. In other words, economic struggle may not have been sufficient to transform the ideology of racial inequality, but shared organizing has sometimes been fruitful and its potential can be great. Unifying potential does not, however, remove the necessity of antidiscrimination rules and effective enforcement—both elements that were missing during most of the period studied here.

Bruno finds evidence everywhere of the unifying and egalitarian class values of steelworkers. He recognizes that the communities that expressed those values had become increasingly segregated, so that workers of different races did not actually live these values together consistently. He retains confidence, however, that those values were genuine and in some ways unifying. His emphasis on neighborly solidarity understates the effects of division but resolutely insists on the importance of community to class.

In contrast, Nelson is skeptical about class consciousness even when union leaders supported civil rights. In 1949, a white union leader with a socialist background went swimming with black workers to integrate the local pool; the next day, he encountered hostility and one violent attack from whites at work.¹⁶⁴ This leader did not lose white support; he was elected to chair the grievance committee and then to five consecutive terms as local union president. Nelson comments that support came “not only from the black voters who voted as a bloc, but also from many whites in the mill, some of whom were no doubt endorsing his skill as an effective representative of their interests on the shop floor far more than his commitment to

164. *Id.* at 264.

racial equality."¹⁶⁵ In this view, white workers who voted for an effective radical leader through the repressive 1950s must have acted from economic self-interest *other* than class consciousness, and union activities did not change consciousness among white workers. That narrow view misses the strength of radical leadership in its mistrust of the rank and file, and it also misses the reproduction of racial privilege and subordination throughout society.

Radical experience formed the basis of good leadership on both equality and shop floor issues. Class "happens" as people work together and change. White support for a radical and effective leader who fought for civil rights could show class consciousness that brought together economic self-interest and willingness to move toward equality.

In *Hedges*, the Supreme Court had adopted a constitutional principle that made the Civil Rights Act of 1866 irrelevant to unions and factories. From the 1940s to the 1960s law allowed inequality at work while the public and private regulatory structures governing homeownership and development imposed redlining requirements that increased neighborhood segregation. Community life involved changes that pulled away from unity even where workplace struggles pulled toward it. A radical union leader could win victories for equality, but forces inside and outside the plant made a "cure" for racism unlikely. The next part of this Article explains the difficulties of consolidating victories through community organizing in Los Angeles during the 1940s.

III. CLASSES AND RACE: THREE VIEWS OF SAN PEDRO

In addition to workers and employers, other actors affect the experience of class in society, including those involved in the housing market (developers, insurance companies, real estate agents, and the financial institutions that make loans or underwrite them, including the state). If class struggle comes with or before class formation rather than after, as many scholars agree, then housing segregation affects the possibilities for shared struggle and class formation. Similarly, if class ties are forged in

165. *Id.*

communities as well as workplaces, segregation affects the development of those ties.

Housing segregation limits access to work both indirectly, though its impact on travel time and social networks, and also directly in cases where jobs favor local residents. Racial exclusion at work limits opportunities for shared interests on the shop floor. Housing segregation appears natural in part because, as cities and suburbs spread rapidly after World War II, there were few integrated developments.¹⁶⁶ This part compares three portraits of race in working class life in San Pedro, California in the 1940s, including a study of organizing in an integrated housing project.

Henry Kraus was a leftist writer¹⁶⁷ who moved to San Pedro, California with his wife Dorothy to work in wartime production.¹⁶⁸ San Pedro was home to the Port of Los Angeles, shipyards, docks, and other industries.¹⁶⁹ The Krauses chose an integrated housing project, Garden City, over a nearby all-white project.¹⁷⁰ Henry Kraus' book about their experience, *In the City Was a Garden*, describes both

166. STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 141 (2000). In the mid-1950s, the United Auto Workers built an integrated subdivision called Sunnyhills near a new Ford plant in Milpitas, in Northern California. At first, they could not find a willing developer. The first builder who agreed to open occupancy could not obtain land; another got land but could not get financing. When union leaders convinced an insurance company to take the mortgage, local government increased the fees for water and sewage. Another developer sued to stop construction. Sunnyhills finally opened without reports of "racial hostility." *Id.*

167. Kraus had edited a union newspaper in Flint, Michigan and written a book on the Flint sit-down strike. HENRY KRAUS, THE MANY & THE FEW xiii (1947).

168. HENRY KRAUS, IN THE CITY WAS A GARDEN: A HOUSING PROJECT CHRONICLE 18 (1951).

169. See, e.g., Port of Los Angeles, http://www.portoflosangeles.org/idx_history.asp (last visited Oct. 7, 2008) ("San Pedro Bay shipyards collectively employed more than 90,000 workers and produced thousands of war-time vessels at record pace.").

170. See KRAUS, *supra* note 168, at 16-19 (discussing integrated project). They discovered "an implicit racial discrimination was practiced" at the other development. *Id.* at 85. The policy of racial exclusion eventually changed when a new manager admitted African-American tenants. *Id.* at 86.

racism and antiracist community consciousness in ongoing contest among residents.

From the day they moved in, Henry and Dorothy Kraus tried to build shared activity and community spirit in Garden City.¹⁷¹ They expected to encounter racism because they expected many neighbors would have come from the South. Residents came from all over the United States, and many white residents, not only Southerners, expressed discomfort about living in an integrated project.¹⁷² To bring residents together, Henry and Dorothy Kraus would have to work against racism consistently.

They learned as they organized. It was not enough to argue with white residents against prejudice; they also needed to work for the trust and participation of minority residents. Henry Kraus recounts their effort to organize the first recreational activity, a dance for residents.¹⁷³ Several white residents tried to persuade dance organizers to exclude African-American residents,¹⁷⁴ and some would have excluded Latinos.¹⁷⁵ Others worked to ensure the event would include all. The tenants' group voted to invite everyone. No African Americans came to the dance, however, although they did buy tickets. Kraus admitted that the whites who had fought so hard against white racism had forgotten the basic work of making black residents feel welcome.¹⁷⁶ At later dances, integrated attendance was widespread, though dances stopped after the "zootsuit riots."¹⁷⁷

171. See, e.g., *id.* at 9-10 (purpose to organize, collective action); *id.* at 38 (initiate discussion with manager about social programs); *id.* at 44-45 (argue against prejudiced fears of neighbor).

172. See *id.* at 60-69.

173. See generally *id.* at 45-67.

174. *Id.*

175. *Id.* at 61. For example, one woman said at the dance organizing meeting that she would not invite "Mexicans" to her house—without realizing that she was speaking to a "Spanish" woman from New Mexico. *Id.*; see *id.* at 25-26 (discussing presence of Mexican-Americans in Garden City).

176. *Id.* at 67.

177. *Id.* at 91-92. ("We had only one regret in shutting off our dances. Several Negro couples had begun attending them with results that fulfilled all our expectations . . . [A] mixed group was no bar to 'having fun.'").

Residents left the project each day to work in industry. The tenants' occupations included a longshoreman, aircraft riveter, welder, shipfitter, cabinetmaker, and typist. Dorothy Kraus used the industrial work experience of a white woman from the South to make an effective argument against racism. Dorothy compared the woman's race prejudice to the beliefs of men who belittled her work as a woman in a heavy industrial job.¹⁷⁸

As residents grew increasingly organized, they stood up for racial equality in several contexts. At the nearby housing project, the first black tenants met furious hostility from white tenants who organized to demand their exclusion.¹⁷⁹ In response, Garden City residents successfully urged the Housing Authority to resist racial discrimination, with support from the C.I.O. and the Shipbuilders Union.¹⁸⁰ When a black tenant was charged with sexual assault on a twelve year old white girl,¹⁸¹ tenants organized interracial attendance at the trial and encouraged a crucial witness to testify.¹⁸² A white woman who had originally found it difficult to include black neighbors at the dance became active in his defense; she helped organize tenants and supported the witness, a young white mother who had seen the defendant working on his car at the time of the assault.¹⁸³ The campaign and resulting acquittal created a

178. *Id.* at 45.

179. *Id.* at 86-87.

180. *Id.* at 86-87. In response, the tenants at Garden City wrote to the Housing Authority urging the Authority to resist racial discrimination and giving the "peacable" integrated residential life of Garden City as a positive example. *See id.* at 89. They sought support from local unions and received it from the CIO; the AFL did not respond. *Id.* The Shipbuilders Union told its members that racist agitation was grounds for expulsion. *Id.* The Housing Authority sent a letter to all residents of all projects that discussed "national unity" and the best interest of the country; the letter warned that "[d]iscrimination in any form constitutes sabotage of our war effort" and that anyone who caused any disturbance of the peace through social intolerance would be asked to move out. *Id.* at 90. This successful intervention encouraged tenant council members to think of further activism. *Id.*

181. *Id.* at 90-96.

182. *Id.* at 102-13.

183. *Id.* at 102-12.

“point of departure for the general absorption” of black residents into community life and activities.¹⁸⁴

After the War, the residents hoped to purchase their units cooperatively.¹⁸⁵ At one point, almost nine-tenths of the residents had signed petitions supporting “mutual ownership.”¹⁸⁶ Support among tenants diminished after long delays in federal decision-making, internal divisions, and tenant turnover.¹⁸⁷ Redbaiting and prejudice broke the sense of trust and solidarity among tenants.¹⁸⁸

The Federal Housing Administration (FHA) refused to support a loan and stated their belief that “a ‘mixed’ project constituted a bad business risk.”¹⁸⁹ Conservative policies in Congress delayed the possibility of a cooperative purchase and seemed likely to hand the housing over to private realty interests.¹⁹⁰ By 1948, when the Federal Public Housing Authority (FPHA) would have allowed the disposal of housing to mutual ownership, support for the purchase had evaporated.¹⁹¹

In a study of the Los Angeles waterfront during the War years, Nancy Quam-Wickham found an ongoing struggle between labor and other groups: the union, the military, employers, and the Pacific Coast Maritime Industry Board vied for control of jobs and conditions of work on the docks during World War II.¹⁹² The International Longshoremen’s

184. *Id.* at 113.

185. *Id.* at 159.

186. *Id.* at 175, 247.

187. *Id.* at 184-247.

188. The first tensions came from religious divisions, *id.* at 175-87, followed by public attacks on the editor of the “leftist” Daily People’s World, whose family was being moved to Garden City from another project. *Id.* at 187-88. The City Council voted to evict the family and imposed a loyalty oath on housing applications. *Id.* at 188. The tenant council voted not to defend the family facing eviction out of concern that the publicity would defeat mutual homeownership. *Id.* at 191. Internal conflicts and accusations of widespread Communist influence followed. *Id.* at 191-242.

189. *Id.* at 249.

190. *Id.* at 243-49.

191. *Id.* at 251.

192. See Nancy Quam-Wickham, *Who Controls the Hiring Hall? The Struggle for Job Control in the ILWU During World War II*, in THE CIO’S LEFT-LED UNIONS 47 (Steve Rosswurm ed., 1992). The Pacific Coast Maritime Industry

and Warehousemen's Union, ILWU, had won control of the hiring hall.¹⁹³ Control of access to jobs "vested tremendous power in the local union."¹⁹⁴ "No longer could employers arbitrarily refuse to hire individuals or certain groups of workers based on race, ethnic background, political orientation, or union beliefs."¹⁹⁵

A "bitter, running battle between labor and industry" challenged union control of hiring.¹⁹⁶ In 1941, the Army said it would need to use troops to work the docks. The union expressed concern about a "Negro Battalion" planned for longshore work in Oakland in 1941 and in Seattle in 1942.¹⁹⁷ In San Diego in 1942, Marines were used as substitutes for longshoremen.¹⁹⁸ Private employers and the military sought to change the system of rotating jobs by creating groups of preferred workers who would work steadily—but the union refused.¹⁹⁹ On Army docks, government clerks replaced union clerks, who were laid off.²⁰⁰ In some areas, longshoremen were replaced by workers who functioned like civil servants.²⁰¹ Employers took away screening privileges from the union, though the union fought back by instituting a new screening procedure.²⁰² Quam-Wickham concluded that in this system the union was "nearly powerless to prevent abuses."²⁰³

The Maritime Board and the state discriminated openly by race despite Executive Order 8802, which banned racial

Board was a subsidiary of the regional War Production Board and included the union, and representatives of employers. *Id.* at 48.

193. *Id.* at 48-49.

194. *Id.*

195. *Id.* at 49. Given pressures for wartime speedup, the union used a variety of measures to maintain a mix of accommodation and resistance on the docks during the war. *Id.* at 54-55.

196. *Id.* at 56, 58-59 (describing actions initiated by employer representatives or the Maritime Industry Board to diminish union control of hiring).

197. *Id.* at 50 (Oakland); *id.* at 56 (Seattle).

198. *Id.* at 56.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 58.

203. *Id.* at 59.

discrimination in employment in defense industries.²⁰⁴ The union contested discrimination and condemned it throughout society, in the union and on jobs. Harry Bridges denounced racism.²⁰⁵ But Quam-Wickham found that union leadership "dramatically underestimated the extent and potency of racist beliefs among its rank-and-file members."²⁰⁶ White workers reacted to the arrival of minority workers with slowdowns or work stoppages, and one local voted to exclude a black worker solely on the basis of race.²⁰⁷ The international leadership did not take action to control discrimination at the local level. Local leaders did little to organize against racism, and rank-and-file members often found themselves opposed to union leaders on racial issues.²⁰⁸

In this atmosphere, it was difficult to distinguish discrimination from the protection of local control that empowered the union. The shortage of workers during the war created a large number of openings. Union members protected those people they trusted as "men of 1934" who had been part of their historic struggle. But relatively few wartime black workers had been in California for that struggle in the 1930s, though many had worked in the South as longshoremen in segregated locals of the International Longshoremen's Association.²⁰⁹ Local procedures allowed white workers to refuse to work with black workers by returning to the hiring hall to get new assignments.²¹⁰ As white workers resisted the inclusion of African-American "strangers," the rank-and-file

204. *Id.* (describing discrimination); see Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941) (banning discrimination on the basis of race, color, creed or national origin in defense and government contracting because discrimination denied work to needed workers and undermined national unity).

205. Quam-Wickham, *supra* note 192, at 59 (comparing racist assaults on black workers to sabotage of the war effort and to attacks on labor by bigots who sought to divide workers). Yet Bridges also blamed black workers, saying they sometimes lacked discipline and experience, causing antagonism. *Id.*

206. *Id.* at 60.

207. *Id.* at 60 (work stoppages); *id.* at 64 (excluding of a black member in Portland).

208. *Id.* at 60-62.

209. *Id.* at 62.

210. *Id.* at 64.

commitment of the ILWU became a force for racism.²¹¹ Leaders made cautious and inadequate responses to racism at the grassroots level. The “invaluable weapons” of union control of the work force through the hiring hall and the investigations and promotions committee became “exceptionally effective exclusionary devices through which workers could determine which elements of the working class their union would represent.”²¹²

Many of the “racial exclusionists” were not young war workers from rural backgrounds but “old-timers,” many of whom had “created that militant, left-wing union in the 1930s.”²¹³ Quam-Wickham reported that the ideological commitment to antiracism prevailed among left-wing activists. In contrast, the rank-and-file workers in the local defended their jobs through the union control of labor, constraining the antiracist political agenda of union leadership.²¹⁴

When Bruce Nelson read Quam-Wickham’s chapter on the docks, he found the racism among white dock workers the most significant part of her study.²¹⁵ Years earlier, Nelson had done a study of the radical ILWU during the 1930s. In the union’s early struggles, he had found evidence of interracial solidarity to confirm his belief that “class” would triumph over ‘race.’” In the 1930s, however, relatively few black longshoremen had worked on the docks, and no changes had affected the racial makeup of the waterfront.²¹⁶ Persistent racism in the ILWU during the 1940s shook Nelson’s beliefs. How could members of a militant, left-led, democratic union—whose members had demonstrated against fascism and marched in May Day parades—have become party to the exclusion of black workers?²¹⁷

211. *Id.* (“This powerful instrument of workers’ control—the hiring hall—clearly was misused by the reactionary and the racist to further job-conscious, not class-conscious, unionism.”).

212. *Id.* at 66.

213. *Id.* at 67.

214. *Id.*

215. NELSON, *supra* note 2, at xxiii-xxiv (discussing Quam-Wickham, *supra* note 192).

216. *Id.* at 23.

217. *Id.*

Nelson's study found racial hostility to black workers in San Pedro. The local union controlled layoffs in ways that disproportionately removed black workers and then broke union agreements to favor whites in rehiring.²¹⁸ After the war, the union decided to remove from the register the five hundred workers with lowest seniority, placing them on a list of the unemployed with the understanding that "no new men (would) be taken into the industry until the above 500 men were called back."²¹⁹ The local did not keep that promise.

Almost half the workers laid off were black, and together they made up about ninety percent of all black workers in the San Pedro local.²²⁰ During the next three years, the union added former members and new white workers without recalling the unemployed. When the union did re-register unemployed workers, they called back whites who had lower seniority before black workers with higher seniority.²²¹ Hostile whites said they looked forward to having a "lily-white" union again.²²² Harry Bridges and the union leadership did not require the San Pedro local to follow its own rules. Black workers turned to legal action after passage of the Taft-Hartley Act.²²³ Decades passed

218. *See id.* at 110-17.

219. *Id.* at 115.

220. *Id.* at 114.

221. *Id.* at 114-15. Longshoremen returning from military service were automatically reregistered during this time. Though Nelson does not discuss the statute, longshoremen in military service appear to have been covered by the Selective Service and Training Act of 1940, the first peacetime draft in American history, which mandated that men who were drafted had a right to return to their positions after the war with seniority as if they had never left for military service. *See, e.g.*, *Fishgold v. Sullivan Drydock & Repair*, 328 U.S. 275, 285-86 (1946). Neither the statute nor the promises to the San Pedro unemployed provided automatic registration for union members who had transferred to other locals, but the San Pedro local automatically reregistered those members anyway. NELSON, *supra* note 2, at 115. The discriminatory hiring of newer white workers before laid-off African-Americans violated bargaining agreements and union promises. *See, e.g., id.* at 115 ("Local 13 had voted 'that no man be initiated into this union' before its unemployed members were 'called back.'").

222. NELSON, *supra* note 2, at 115.

223. *Id.* at 121 ("In 1947 a sizable number of blacks—nearly a hundred—turned to the legal system for restitution.") Their legal actions included appeals

before the union fully recognized the harm done to the “Unemployed 500.”²²⁴

Residential segregation protected and shaped white privilege in San Pedro. Ties among union workers had formed in the mostly-white pre-War workplace. White longshoremen brought their friends and family members who were hired before the “Unemployed 500.”²²⁵ Those preferences favored residents of San Pedro, but San Pedro had been almost all-white during the 1930s, so the residential preference had racial consequences.²²⁶ African Americans had migrated to the area during the war and encountered housing segregation. White workers could therefore describe their actions as protecting “people who lived close” against “out-of-towners.”²²⁷ In 1951, union members voted to require ten years of residence in Los Angeles for applicants to work on the docks.²²⁸ Because so many African Americans had arrived during the war, the ten-year residency requirement excluded most black workers during the expansion years of the early 1950s.²²⁹

Nelson explains this disproportionately white hiring process as a result of combined factors: the exclusion of black workers from the docks before the war and simultaneous exclusionary actions by “white Angelenos [who] had been ruthlessly vigilant in protecting the racial homogeneity of their neighborhoods by means of restrictive

to the executive board of the international union, complaints to the National Labor Relations Board, and suits for damages in the courts. *Id.*

224. *Id.* at 114 (“Bridges could hardly have anticipated that the decision to deregister five hundred men in San Pedro would haunt the ILWU for the next twenty-five years.”).

225. *Id.* at 115.

226. *Id.* at 120 (“Blacks . . . had not been on the picket lines in 1934; they had not worked side by side with the '34 men thereafter to transform conditions on the waterfront. Nor had they lived, as neighbors and friends, in the working-class communities of San Pedro and Wilmington.”). That exclusion was not coincidental but the product of discrimination at work and in community life. *Id.* “[T]here were only two black families in San Pedro during the 1930s, and the men of both households worked as janitors in downtown commercial establishments.” *Id.* at 110.

227. *Id.* at 121.

228. *Id.* at 117.

229. *Id.*

covenants, the organization of aggressively exclusionist homeowners' associations, and—when necessary—vigilante violence.”²³⁰ By the end of the 1930s, African Americans were “almost totally excluded from large sections of the city and most suburban areas.”²³¹ Nelson concludes that “[w]hites accepted this pattern of exclusion and enforced inequality as *natural and necessary*.”²³² In the longshoremen’s sense of identity, “whiteness merged with class”²³³ despite the great struggles and changes of the 1930s that those longshoremen had experienced in a union that took strong stands against racism and discrimination.

It can be difficult to see the role of law in making whiteness appear natural—but in fact law played a key role. The “white Angelenos” who enforced housing segregation were not mostly dock workers. Programs were organized and implemented by government agencies, brokers, lenders and developers as well as individual homeowners. Wartime migration and housing restrictions put intense pressure on the limited housing supply for African Americans. A Los Angeles NAACP lawyer described the rapid growth in litigation before *Shelley v. Kraemer*²³⁴ held racial covenants unenforceable:

The war workers had to find living space somewhere, and the middle class began to look around for better homes. The result was wholesale violations of racial covenants and a vigorous counter-attack. A staggering number of lawsuits were brought—approximately two hundred were filed in Los Angeles in a four-year period, and other cities had much the same experience.²³⁵

The segregated metropolis that made whiteness feel “natural and necessary” was neither a spontaneous development within the housing market nor the mere accumulation of individual white housing choices. Redlining

230. *Id.* at 120.

231. *Id.* at 336 n.69.

232. *Id.* at 120 (emphasis added).

233. *Id.*

234. 334 U.S. 1 (1948).

235. See Loren Miller, *A Right Secured*, 166 THE NATION 599, 600 (1948) (providing explanation of the importance of the Supreme Court decision in *Shelley v. Kraemer* by an attorney who worked with NAACP litigation team).

is a regulatory structure that enforced residential segregation in the real estate market.²³⁶ The federal government created redlining maps for mortgage lending and underwriting.²³⁷ During years of suburban growth that included the rapid expansion of Los Angeles, minorities could not get federal loans; lenders and agencies refused to make loans and insure mortgages in neighborhoods where minorities lived.²³⁸

As a comprehensive system, redlining revealed that white home buyers were not simply expressing a preference for white neighbors. Racism among individual white buyers and sellers was one of the engines of residential segregation, but individual preferences did not create a stable regime. Redlining protected investors against the danger that whites would be too willing to live near or sell to people of color. In the process, redlining systematically diminished the resources available for white buyers who would have moved to integrated neighborhoods.

In Garden City, when residents organized to buy the apartments, redlining blocked the FHA loan for the initial purchase. If the residents had managed to find another source of funding to buy the project, redlining would have had a continuing effect after the purchase. When units changed hands in the future, prospective buyers of any race would have lacked access to federally funded financing or insurance because the project was integrated; those restrictions in turn could have affected the value of units and the ability of some buyers to purchase them.

As a background regulatory system, redlining had substantial cultural power. As redlining shaped segregated neighborhoods, it simultaneously shaped life experience in a way that seemed a natural and spontaneous reflection of consumer preferences. Marching together in the 1930s had

236. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 186-216 (1993).

237. See, e.g., CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 234 (1955) (describing the promotion of racial discrimination and racial covenants by the Federal Housing Administration as creating damage that persisted after federal practices changed); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 190-230 (1985) (emphasizing importance of federal role in producing segregation and shaping private-sector discrimination); MASSEY & DENTON, *supra* note 236.

238. MASSEY & DENTON, *supra* note 236.

taught interracial solidarity to dockworkers, but residential segregation taught different lessons to white workers who lived in white communities. Henry Kraus's white neighbor changed her mind about prejudice and worked in support of racial justice, but if she had needed to move somewhere else after Garden City, she would have had difficulty finding financing in an integrated neighborhood. If she had moved to an all-white neighborhood, the lessons of daily life would have been very different than her experience in the integrated housing complex with neighbors who organized entertainment and confronted challenges together.

Some labor unions took strong positions against housing discrimination. When Garden City tenants organized to support integration at the other housing project during the War, they drew support from labor.²³⁹ In 1953, a worker from a United Auto Workers (UAW) local in Long Beach led violent, hostile resistance to integration in Compton; the union put him on trial for "conduct unbecoming a union member" and then suspended him.²⁴⁰ The C.I.O. and its unions joined civil rights groups to support the legal challenge to racial covenants.²⁴¹

Those labor positions against discrimination would have educated members and supported civil rights locally and nationally. As an intervention in a system that allowed discrimination, however, labor union opposition was not sufficient to transform housing segregation. Some whites (union or non-union) would discriminate while buying and

239. See *supra* note 180 and accompanying text.

240. MEYER, *supra* note 166, at 128-29. The NAACP sought help from the state attorney general, and police prevented further violence. *Id.*

241. See Miller, *supra* note 232, at 600 (noting participation of AFL-CIO in *Shelley v. Kraemer*); see also Brief for Congress of Industrial Organizations et al. as Amicus Curiae Supporting Petitioners, at 1, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72, 87), 1947 WL 44164. The brief for the C.I.O. and more than twenty-five unions explained the C.I.O.'s interest in *Shelley* by describing its history of work against discrimination and positions against discrimination of the C.I.O. and member unions. The brief described the direct interest of unions in fighting housing segregation ("Many thousands of members of applicant labor organizations are Negroes") and described the "unbelievable hardships" of workers who had been forced into "physical isolation from decent jobs and forced to take undesirable employment" and forced by restrictive covenants to live in slums. *Id.* at 2-3.

selling in the same markets as union members who did not discriminate.

When redlining structured those markets by race, it increased the incentives for whites to exclude people of color. Housing discrimination has powerful effects in addition to its economic impact. Housing segregation can make white attachment to privilege seem natural. Furthermore, it facilitates discrimination such as the preferential hiring of white family and neighbors that left black workers unemployed in San Pedro. To the extent that bias appears “natural,” it further obscures the role of law in structuring the market for jobs and housing.

Racism and discrimination are both structural and cultural. Garden City residents did not succeed in obtaining federal funding for integrated housing. The national ILWU, which had worked for racial equality nationally and within the Los Angeles area, failed for decades to address the displacement of African-American workers that had been contrived by local leadership. The union failure came from both its commitment to local autonomy and, while facing attacks elsewhere, the unwillingness of national leadership to wage a serious fight with local leaders.²⁴² When the UAW put a member on trial for leading racist resistance to the integration of Compton, it would have taught a profound lesson to all members of that union—yet most resistance in that white community and others would have remained beyond reach of that local or of any union. Class-based organizing was important, but broad antidiscrimination measures would be necessary, including law enforcement, to change the patterns that were shaping the community-based experience of workers.

Victories against discrimination in various forms and locations did not stop the larger processes of urban development. Despite white resistance, black workers won some access to better jobs in steel mills in the 1940s, Youngstown pools integrated, and public housing tenants in Los Angeles stood up against housing segregation and for racial justice. But neighborhoods continued to become increasingly segregated even when unions took exemplary stands. The forces that shaped neighborhoods by race were commercially organized and larger than individual buyer

242. NELSON, *supra* note 2, at 110-17.

preferences. When the Supreme Court ended enforcement of racial covenants, discrimination continued in marketing, lending, insurance, and in individual transactions. Working class whites who learned solidarity from unions were still likely to inhabit neighborhoods in which discrimination affected both the price of housing and consumer beliefs about value. Systemic work to dismantle that regime did not begin until the 1960s, after the president ended discrimination in federal housing programs by executive order,²⁴³ Congress passed the Fair Housing Act, and the Supreme Court overruled *Hodges* in *Jones v. Mayer*.

The lessons of this history must therefore include questions about the nature of class consciousness and race consciousness. When white workers who had fought great interracial organizing battles turned their hard-won local autonomy against African-American workers ten years later, Bruce Nelson saw evidence of the depth and persistence of white working class racial identification. His implicit expectation was that the interracial class consciousness of 1934 would become a long-term awakening to shared interest. The underlying problem for this expectation is not that “class” failed to triumph over “race,” but rather that both “class” and “race” are ongoing processes. Therefore, white working class identification with privilege need not be fixed to be powerful.

The background legal rules play a powerful role in the production of class and race. If the Garden City tenants had secured the FHA loan and built an integrated community, it would have been a triumph for organizing, class consciousness, and work against racism. But that triumph would also have been temporary. Residents would have moved; workers would have changed jobs; change would have come. Part of the unique power of background rules is that, even while they determine the availability of integrated housing or unionized jobs, they appear in the lives of individuals in the forms of houses and jobs—not a law but a set of places for sale or rent, a set of neighbors, a job application, a paycheck. They fold into the “natural” operation of privilege. That web of background rules does not make privilege unchanging. But it does make the reproduction of privilege harder to see, and it makes

243. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962).

privilege recur and resist change in the absence of larger transformation in law and society.

IV. CLASS, LAW, AND TIME

Nowhere in the world were there similar examples of this kind of mutuality and collaboration across the color line [that existed in interracial activism in late-nineteenth-century Louisiana and Alabama.] In South Africa, in the Caribbean, and in Asia, there are no contemporary examples of biracial labor activism to rival those that emerged in the American South.²⁴⁴

Solidarity takes work, and the forms and timing of its emergence can be hard to predict. In *Cultures of Solidarity*, Rick Fantasia describes problems with determining class consciousness of workers through survey methodology.²⁴⁵ A poll shows that a union will not support a strike; management is encouraged and cracks down. But the workers rally to the strike call and surprise management, the press, and their own leaders by holding the longest, most militant strike in the history of the industry.²⁴⁶

In another example, a comprehensive study of workers at an automobile plant in England showed the workers firmly integrated into the system, satisfied with their wages, and holding no deep grudges.²⁴⁷ Class consciousness seemed almost non-existent. Workers followed "middle-class patterns" and thought their jobs were a boring but inevitable part of life.²⁴⁸ While the study was being printed, union militants distributed its conclusions. A week later, a published report showing the company's high profits per worker was also circulated in the plant. An eruption broke

244. ROBERT H. ZIEGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865, at 41 (2007). Zieger makes this conclusion after recounting a long history in New Orleans that included interracial organizing and strikes, a "race to the bottom" in which each group sought to underbid the other and white workers made violent and sometimes lethal attacks on blacks, massive recruiting and independent organizing by black unions, and the rebuilding of biracial collaboration in the workplace in the early twentieth century while racial oppression and violence intensified in the rest of society. *Id.* at 40-41.

245. RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 6-8 (1988).

246. *Id.* at 6-7 (describing the steelworkers' strike of 1959).

247. *Id.*

248. *Id.* at 7.

out, with workers storming the offices, battling police, and shouting leftist, anti-management slogans.²⁴⁹ Fantasia concludes that the snapshots of “attitudes” of workers completely failed to capture their dynamic potential for change, in which even the survey that sampled their opinions became part of the social dynamic.²⁵⁰

These studies show that solidarity among workers is dynamic, whether or not that society and workplace include workers of different races.²⁵¹ Class-conscious mutuality, solidarity, and group action are not always protected under federal labor law.²⁵² Law works directly to set terms on which workers can organize; it works indirectly to set parameters within which some struggles are more likely to succeed than others. Legal constraints become part of the culture within which people live and work, and therefore part of the way people understand the world and act within it.

A. *Rules, Time, and Power*

The labor, anti-regulatory, and race cases created a set of repressive rules affecting workers. States could not protect maximum hours or minimum wages for most workers.²⁵³ Congress did not have the power to forbid private individuals to deny employment or property to others on the basis of race.²⁵⁴ Congress could not use its

249. *Id.*

250. *Id.* at 7-8. Fantasia does not, however, treat either the unmobilized or the militantly mobilized state of the workers as defining their “true” class consciousness.

251. As Robin Kelley concluded in his study of communist organizing in Alabama, “[R]acial divisions were far more fluid and Southern working-class consciousness far more complex than most historians have realized.” KELLEY, *supra* note 73, at xii-xiii.

252. See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996) (discussing devaluation of group action by Congress and federal courts); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (analyzing limited recognition of solidarity in worker organization for mutual aid and protection).

253. *Lochner v. New York*, 198 U.S. 45 (1905).

254. *Hodges v. United States*, 203 U.S. 1 (1906), *overruled by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

power over interstate commerce to protect an employee against being fired by a railroad simply for being a union member, even though Congress sought to avoid strikes and business disruptions and had found the previous federal law inadequate to prevent a major strike.²⁵⁵ States could not protect the right to organize by banning “yellow dog” contracts in which employees promised not to join a union,²⁵⁶ but employers who forced their employees to sign those contracts could enforce them against interference by union organizers.²⁵⁷ The aversion of whites to African Americans seemed to white judges to be such a natural force that laws requiring racial segregation in public accommodations were not state action in violation of the Fourteenth Amendment.²⁵⁸ In part because it seemed impossible to constrain the hostility of whites, state laws disfranchising African American voters could not be reached by the courts despite the Fifteenth Amendment.²⁵⁹ Congress could not even regulate child labor under the Commerce Clause between 1918 and 1941.²⁶⁰ On the other hand, states could pass some laws governing health and safety conditions for some workers.²⁶¹ And states could not mandate involuntary and coerced labor to enforce contracts.²⁶²

255. See *Adair v. United States*, 208 U.S. 161 (1908); see also *id.* at 185-87 (McKenna, J., dissenting).

256. See *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229 (1917).

257. *Id.*

258. See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (asserting that decision only permitted reasonable regulations; that the legislature could determine reasonableness by reference to existing customs and traditions, to promote comfort and preserve peace and order).

259. *Giles v. Harris*, 189 U.S. 475 (1903).

260. *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby Lumber*, 312 U.S. 100 (1941).

261. *Holden v. Hardy*, 169 U.S. 366 (1898).

262. *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911). The peonage cases are a good example of the importance of law enforcement to effectuate recognition of legal rights because peonage persisted long after the decisions in *Bailey* and *Reynolds*. See GOLUBOFF, *LOST PROMISE*, *supra* note 84, at 181-34, 138-40 (describing importance of Justice Department decision to take on peonage cases which would not elicit unified Southern resistance); KLARMAN, *supra* note 11, at 86-88 (arguing that Progressive-era

States ultimately established the power to enact laws against discrimination,²⁶³ but after Reconstruction states with the most extensive history of exploitation of African-American labor had moved to requiring segregation rather than equality. The high points of democracy and equality in the South had been remarkable. For example, the Louisiana Constitution of 1868 guaranteed all citizens the “same civil, political, and public rights and privileges,’ [and] equal access to public accommodations ‘without distinction or discrimination on account of race or color.”²⁶⁴ After Reconstruction ended, Louisiana changed its constitution in 1879; then the *Civil Rights Cases* held that there was no comparable federal guarantee of equality.

This legal regime affected possibilities for workers throughout the country. The role of law in repressing unity was more obvious in the South. Union meetings could violate local segregation ordinances, and interracial activism continued to trigger vicious repression.²⁶⁵ But the structural problem of discrimination at work was national.

peonage decisions had little effect because they were not enforced and peonage persisted through alternative mechanisms).

263. The Supreme Court ultimately upheld the New York antidiscrimination law in the *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-96 (1945). See Goluboff, *Economic Inequality*, *supra* note 84, at 1416, 1445-46.

264. Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 789-90, 792 (2004); see CARYN COSSÉ BELL, *REVOLUTION, ROMANTICISM AND THE AFRO-CREOLE PROTEST TRADITION IN LOUISIANA, 1718-1868*, at 222-75 (1997) (describing how the “politics of radicalism” based on ideals of the French Revolution, particularly as those ideals had affected the Haitian Revolution, influenced the Afro-Creole community in New Orleans during the Civil War and Reconstruction).

265. See, e.g., KELLY, *supra* note 70, at 155 (describing repression in 1919 by employers, directed disproportionately at black workers, and by vigilantes); LETWIN, *supra* note 70, at 150-51 (describing repression in 1908 by governor who claimed labor problems had become racial problems and sent state troopers to destroy strikers’ tent colonies). Political repression of interracial activism remained fierce. In 1932, a peaceful march of the unemployed, “the largest biracial demonstration in the South in decades,” led to a young Communist organizer being put on trial for attempted insurrection. Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2628 (1992); see also KELLEY, *supra* note 70, at xii-xiii (arguing that when most scholars attribute the “failure” of the Communist Party to attract Southern workers to “[r]eligious fundamentalism, white racism, black ignorance or indifference, the Communists’ presumed insensitivity to Southern Culture, their advocacy of black self-determination during the early

For a white worker seeking or protecting a job at a livable wage, if other factors were equal, it could be easier to exclude competition than to organize against employers. Of course, other factors were not equal. Even when exclusion was effective, it provided only relative advantage for whites rather than safety or security, and that advantage was often temporary. Workers still needed to organize to change systematic disempowerment—and often they did. Law had created different incentives that pulled against each other. The existence of countercurrents of solidarity was evidence of the potential of class as an organizing force, even in competition with other structural incentives. In this hostile regime, it is not surprising that transformation by “class” solidarity was not more consistent and effective in creating interracial unity.

David Bernstein argues that *Lochner* helped African-American workers.²⁶⁶ He believes labor regulation created advantages for white workers, sometimes intentionally. Unregulated competition would have allowed African-American workers to underbid whites and enter the market by working longer hours for lower wages.²⁶⁷ Bernstein does not seem to notice that competition unrestrained by law was indeed taking place in Arkansas in 1903. African-American farmers and sawmill workers had competed successfully for the leases and jobs that triggered white reaction in the violent attacks in the *Hedges* and *Morris* cases.

The process of underbidding workers who already earn low wages involves a “race to the bottom” that depends on some workers being so disadvantaged that they will work for even less money.²⁶⁸ African-American tenants and

1930s, and an overall lack of class consciousness,” they are overlooking the role of violence in suppressing radicalism).

266. DAVID BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATION, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 5-7 (2001).

267. See, e.g., David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 129-31 (1993) (criticizing the Fair Labor Standards Act that imposed a minimum wage and arguing that the minimum wage harms African Americans because it prevents them from underbidding white workers).

268. Cf. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) and upholding a law setting minimum wages for women and minors). In *West Coast Hotel*, the Supreme Court

workers accepted less money because segregation and oppression had already affected the price of their labor, thereby creating particular profit opportunities for landlords and employers. There was no level playing field and no neutral market mechanism. The law and custom of white supremacy regulated the market. When whitecappers attacked black workers, law enforcement defended the whites or joined the attacks—yet when black tenants used guns to defend their homes, law enforcement attacked or even lynched them.²⁶⁹

This legal and extralegal regime would have been likely to create inequality even if whites and blacks had begun with equal resources. The freedom to bid low, unhampered by legal protection for either civil rights or labor, created a race to the bottom with a brutal finish line in Arkansas. Two hundred black farmers fled the area after the attacks that gave rise to the *Morris* case. Reuben Hodges went free. After *Hodges*, prosecutors dropped charges against whitecappers. Whites and blacks continued picking cotton in those Arkansas counties and conditions grew worse; in the 1920s, the NAACP representative called the region the “American Congo.”²⁷⁰

I am not arguing here that capitalism causes racism.²⁷¹ The manifestations of racism in institutions and daily life cause it to be reproduced in a variety of ways. But this legal regime encouraged racism and facilitated discrimination while it protected capitalism. The set of legal rules that

recognized the destructive quality of the race to the bottom and decided that legislatures must have power to avoid it: “The legislature was entitled to reduce the evils of the ‘sweating system,’ the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.” *Id.* at 398-99.

269. WHAYNE, *supra* note 25, at 47-48 (describing how black farmers who confronted whitecappers in 1904 were arrested and then lynched); *id.* at 48 (describing attacks on blacks rooted in competition over contracts with plantation owners; because blacks were more impoverished, planters could keep a larger share of crops by contracting with African Americans); *id.* at 49 (describing how nightriders drove away two hundred African Americans who fled for their lives; detectives killed while defending remaining sharecropper).

270. *Id.* at 47-50, 54 (describing “the Congo of America” by its inequalities); WOODRUFF, *supra* note 60, at 1.

271. Cf. MICHAEL GOLDFIELD, THE COLOR OF POLITICS: RACE AND THE MAINSPRING OF AMERICAN POLITICS (1997)

constrained the state against protecting workers and that effectively protected capitalists against labor also encouraged channeling the energy of white workers toward excluding others.

That race to the bottom did not protect the price of white labor well or protect it for long. "Poor whites . . . appeared to be the partial beneficiaries of black subordination . . . But in the long run they paid a steep price, for the South's economic dependence on cheap, degraded labor and the political system designed to preserve it made them its victims too."²⁷² The word "sharecropper" became a term of contempt regardless of race.²⁷³

I am also not arguing that white workers always chose race privilege over class or bargained systematically for race privilege and exclusion at the cost of class advancement. In the history of race and labor, many voices spoke to shared class interests and interracial organizing. The legal rules did not make discrimination the best response or a universal response by white workers. Elsewhere, I have criticized the assumption that white workers are naturally more attached to race privilege than are whites of other classes. Theoretically, that claim reflects a gradational concept of *status* rather than a relational concept of *class*.²⁷⁴ In practical terms, it overlooks counterexamples. Shared interest and competition both took place in a society filled with race prejudice and oppression. Concepts of solidaristic class interest were sometimes forged, less frequently consolidated, and particularly difficult to maintain when the legal system gave so little protection to labor and such broad cover to racist exclusion.

272. Lichtenstein, *supra* note 77, intro. 15, 34; see also WOODWARD, *supra* note 14, at 228-29 (quoting white workers who said the rate of compensation for whites were "governed more or less by the rates at which the blacks can be hired" and describing the final appeal in a strike as the "Southern employer's ability to hold the great mass of negro mechanics *in terrorem* over the heads of the white") (internal quotation and citation omitted).

273. Lichtenstein, *supra* note 77, intro. 34.

274. See generally Mahoney, *Class and Status*, *supra* note 6, at 820-21 (citing relational and gradational concepts from Eric Olin Wright and dynamic concepts of interest from Pierre Bourdieu); *id.* at 823-24 (criticizing economic arguments that treat status as a natural drive divorced from power and exploitation); *id.* at 826 (criticizing simplistic "vulgar" concepts of stratification).

The fact that class interest was contested made the structural interventions of law particularly important. By making some actions too difficult and others too easy, the practical force and moral authority of judicial decisions on labor and race undermined interracial activism. Despite this forbidding legal regime, civil rights groups won some victories during those years. Some states enacted anti-discrimination statutes. In 1944, the Supreme Court imposed on unions a duty of fair representation that did not allow white unions to negotiate contracts to exclude African-Americans from the workplace.²⁷⁵ Black workers continued to challenge legal inequality and began to win decisions on interstate transportation.²⁷⁶ Within weeks of the *Steele* decision, the California Supreme Court held in *James v. Marinship*²⁷⁷ that the closed shop was inconsistent with racial discrimination by a union; unions could not have a monopoly on access to work while excluding members based on race. That decision moved workers closer to basic protection against exclusion that a better decision in *Hodges* would have reached forty years earlier—but it applied only in California.

Ultimately, the Supreme Court overruled first the anti-labor cases and then *Hodges* thirty years later. But by then generations of workers had spent their productive lives under a legal regime in which labor organization was difficult and race discrimination was easy.²⁷⁸ Enforcement of

275. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

276. See, e.g., *Morgan v. Commonwealth of Va.*, 328 U.S. 373 (1946). See generally GOLUBOFF, LOST PROMISE, *supra* note 84 (discussing strategies of NAACP lawyers during the 1940s).

277. *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944).

278. Twenty-six years passed before *Coppage* was overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Meanwhile, the National Labor Relations Act had been upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), one of a series of cases that Justice Frankfurter found had “completely sapped” the authority of *Adair* and *Coppage*. *Phelps Dodge*, 313 U.S. at 187. The lack of power to legislate protection for wages and working conditions lasted thirty-two years. In 1937, when the Supreme Court overruled *Adkins v. Children’s Hospital in West Coast Hotel*, the Court had also rejected the *Lochner* rule that interpreted due process to strike down labor regulation. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992) (“*West Coast Hotel* . . . signaled the demise of *Lochner* by overruling *Adkins*.”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws

laws against discrimination²⁷⁹ had not been strong while labor organization was increasing. After the passage of the National Labor Relations Act, as the great organizing wave of labor swept through the country, it remained lawful in almost all states for craft unions to exclude blacks. It was legal for white workers to refuse to organize with blacks. It was legal for textile employers to create the almost all-white paternalism that proved to be a destructive obstacle to organizing. The peak period of labor organizing in American history took place in workplaces shaped by the long period of exclusion permitted by *Hedges*, among workers who lived in landscapes increasingly segregated by race.

Structural protection for labor began to erode with the 1947 and 1959 Acts.²⁸⁰ This was the same time period in which the Supreme Court decided *Brown v. Board of Education*.²⁸¹ The civil rights movement grew during the same period that left leadership within the labor unions, the sector most supportive of broad racial equality, had been decimated by the Taft-Hartley Act.²⁸²

unconstitutional when they believe the legislature has acted unwisely-has long since been discarded.").

279. *Hedges* was overruled by *Jones* in 1968, after the Civil Rights Act of 1964 had banned racial discrimination in private employment. In 1976, the Supreme Court relied on *Jones* to apply the Civil Rights Act of 1866 to contracts and employment discrimination as well as property. See *Runyan v. McCrary*, 427 U.S. 160, 201-02 (1976) (holding that the Civil Rights Act of 1866 intended to remove badge or incidents of slavery); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-95 (1976) (reviewing legislative history to conclude that statute protects "all persons" regardless of race or color, including white persons, in making and enforcing contracts). The Court later reconsidered but did not overrule *Runyan* in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988), which narrowed the scope of contract enforcement under the statute, but not the scope of Congressional power.

280. See Labor Management Relations (Taft-Hartley) Act § 1, 29 U.S.C. § 141 (2006); Labor Management Reporting and Disclosure (Landrum-Griffin) Act § 1, 29 U.S.C. § 401 (2006).

281. 347 U.S. 483 (1954).

282. See, e.g., Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 785 (1998) ("Th[e] trade union left represented an anchor for many of these movements, and the elimination of the Communists from much of American political life fatally diminished the role that the trade unions would play in the emergence of the Civil Rights Movement and the New Left just a decade later.").

By the time action under anti-discrimination law and activism had integrated unions and workplaces, work opportunities were changing. Wildcat strikes and worker militancy reached a high point in 1970.²⁸³ Layoffs increased in the 1970s, and union density declined. Deindustrialization during the 1970s and 1980s took away highly organized jobs where integrated CIO unions had won some of their biggest victories.

B. Authority Against Solidarity

When race discrimination at work became illegal in the 1960s, the previous legal regime had left minority workers with disproportionately low seniority and union leadership disproportionately white.²⁸⁴ Some labor unions tried to integrate union leadership or protect minority workers against disproportionate effects of layoffs because of lower seniority. In Indiana and Michigan, majority-white teachers' unions voted to lay off whites before minority workers, and in Pennsylvania and Illinois unions voted to divide leadership positions by race or to ensure some integration of union leadership by reserving a minimum number of slots for minority workers. Courts found these measures unconstitutional for state employers and illegal under federal labor law for private actors.

283. KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 87 (1988) ("Over the course of the 1960's, the frequency of wildcat strikes grew: the number of strikes that occurred during the life of a contract went from about 1,000 in 1960 to 2,000 in 1969. Contract rejections, which had been rare before the 1960's, soared to over 1,000 in 1967 . . . This strike wave climaxed in 1970, when over 66 million days were lost due to strikes.").

284. The underrepresentation of minorities is evident in data from the U.S. Commission on Civil Rights Report cited in Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983). Minorities made up about fifteen percent of the labor force in 1978, were severely underrepresented in leadership positions within the labor movement. The AFL-CIO had only two black members on its thirty-five-member executive council. Three of 174 national unions had presidents who were members of minority groups. Twelve of the largest unions had about fifteen percent minority membership but no minorities among their national offices (president, executive vice-president, secretary, or treasurer). Eight percent of vice presidents and executive boards were minorities. There were more minorities in local leadership, but they were still underrepresented in proportion to their membership in the unions. *Id.* at 653-55.

Philadelphia had an integrated waterfront union, half black and half white.²⁸⁵ Originally organized by the I.W.W. it became an I.L.A. local.²⁸⁶ Union bylaws structured the leading offices by race: the president was black, vice president white, and other offices divided between the races.²⁸⁷ The Secretary of Labor sued in 1964, and in 1972, the district court found that the policy of dividing union offices by race was not a reasonable requirement for members to be eligible to hold office under the Landrum-Griffin Labor Management Reporting and Disclosure Act (LMRDA).²⁸⁸

The Illinois Education Association had transformed the racial makeup of its leadership in only six years after the majority-white association voted to adopt new bylaws to ensure the inclusion of minority members.²⁸⁹ In 1974, at the urging of a minority caucus, an "overwhelmingly white convention" had voted for new bylaws that added four seats reserved for minorities to the fifty-person Board of Directors and ensured that minorities would have at least eight percent of the 600 seats in the Representative Assembly.²⁹⁰ In *Donovan v. Illinois Education Ass'n*, during his first months on the bench, Judge Richard Posner stated

285. These facts and the long complex procedural history appear in the second of three published district court opinions in the case *Shultz v. Local 1291, Int'l Longshoremen's Ass'n*, 299 F. Supp. 1125, 1126 (D.C. Pa. 1969). *Shultz* quoted bylaws that stated:

In accordance with tradition heretofore observed, the President shall be of the colored race, Vice President, white, Recording Secretary, white, Financial Secretary, colored, Asst. Financial Secretary, white, 4 Business Agents, equally proportioned, 3 Trustees (Auditors) 1 white & 2 colored, 2 Sergeant at Arms, 1 colored and 1 white.

Id. (citation omitted).

286. NELSON, *supra* note 2, at 41-42.

287. See *Schultz v. Local 1291*, 338 F. Supp. 1204, 1206-08 (E.D. Pa. 1972), *aff'd sub nom. Hodgson v. Local 1291*, 461 F.2d 1262 (3d Cir. 1972).

288. *Id.*; see also Goldberg, *supra* note 284, at 684-85.

289. *Id.* at 649-50. In 1974, minorities made up about fifteen percent of IEA members, but there were no minority officers, no minority members on the board of directors, and less than two percent of the 600-member Representative Assembly were minorities. By 1980, one of the officers was African-American, and minorities made up fifteen percent of the board of directors and eight percent of the Representative Assembly. *Id.*

290. *Donovan v. Ill. Educ. Ass'n*, 667 F.2d 638, 639 (7th Cir. 1982).

cryptically that the case did not concern affirmative action, cited the holding from the Philadelphia waterfront in *Schultz*, and held that the LMRDA barred union leadership from creating additional slots for minorities.²⁹¹ Although other interpretations of the LMRDA were possible,²⁹² the Illinois case kept other unions from using the voluntary inclusive measures that had made such a rapid difference.

In the early 1980s, teachers' unions in Michigan and Indiana voted to lay off white teachers with greater seniority first in order to retain minority teachers during economic downturns. In *Wygant v. Jackson Board of Education*, a majority-white union had voted for a contract that retained minority teachers during layoffs outside its ordinary seniority system.²⁹³ A plurality of the Supreme Court held in 1986 that state action to carry out this agreement triggered strict scrutiny and violated the Equal Protection Clause.²⁹⁴

The following year, the Seventh Circuit relied on *Wygant* to hold that South Bend, Indiana could not enter a

291. *Id.* at 640 (not affirmative action); *id.* at 641-42 (LMRDA). The comment about affirmative action was made to distinguish *United Steelworkers v. Weber*, 443 U.S. 193 (1979). See Goldberg, *supra* note 284, at 685-88 (discussing the relevance of Weber to the Illinois case). Judge Posner was confirmed by the Senate on November 24, 1981; he received his commission on December 1, 1981, Federal Judicial Center, <http://www.fjc.gov/servlet/tGetInfo?jid=1922> (last visited Oct. 13, 2009); and *Donovan* was decided on January 4, 1982.

292. See Goldberg, *supra* note 284, at 684-85 (arguing that legislative history and purpose of LMRDA made this plan distinguishable from previous cases involving entrenched power that made it impossible for union members to run for particular offices; Illinois plan did not prevent white members from running for and being elected to the board and representative assembly).

293. 476 U.S. 267 (1986). The adjusted layoffs were originally proposed by the Board of Education in 1972 and agreed to in a collective bargaining agreement by the union; in 1974, the Board of Education refused to lay off tenured "non-minority" teachers before untenured minority teachers and the union sued. The district court held that there was insufficient evidence of past discrimination by the Board of Education to find the changes in layoffs justified as remedies, but that the Board could act to remedy societal discrimination. *Id.* at 270-271. In 1976-77 and 1981-82, non-minority teachers were laid off before minority teachers, and in 1982, they brought the lawsuit that went to the Supreme Court in *Wygant*. *Id.* at 272. The district court and the Sixth Circuit Court of Appeals found the layoffs justified to remedy societal discrimination and maintain "role models" for minority schoolchildren. *Id.*

294. *Id.*

union contract agreeing that no minority school teachers would be laid off when there was no discrimination proven with regard to hiring teachers.²⁹⁵ South Bend was under a consent decree obligating the city to dismantle school segregation, which had been done first by law and then in practice. Since the scheme was remedial and addressed past segregation, four dissenting judges would have remanded for fact-finding to determine whether the "no minority layoffs" approach could be justified as narrowly tailored in light of past discrimination or the consent decree.²⁹⁶

After this series of negative decisions, union leadership continued to integrate, but change happened slowly. In 1978, many unions had no minorities in national leadership. By 2000, the AFL-CIO executive council had three African Americans out of fifty-one council members. "Not one of the five largest unions in the AFL-CIO labor federation [was] led by a black."²⁹⁷

The five largest unions had made the most progress by 2000, with African Americans accounting for seventeen percent of the 192 officials on the executive boards of the five unions.²⁹⁸ But most of those gains had been made in just two unions, each of which had more than one million members: the AFSCME board was one-third African American, and thirty-one percent of the SEIU board members were members of minority groups.²⁹⁹ AFSCME made it "easier for minorities and other noninsiders to win by selecting national board members through elections in

295. Britton v. South Bend Cnty. Sch. Corp., 819 F.2d 766 (7th Cir. 1987).

296. *Id.* at 775 (Cummings, J., dissenting) (stating that on remand the trier of fact could find that the School Corporation had a firm basis for believing it necessary to adopt a remedy even as drastic as the 3-year no-minority layoff provision); *id.* at 779 (Cudahy, J., dissenting) (advocating remand); *id.* at 784 (noting that legal rules had changed since plaintiffs adduced evidence and the court had not had evidence of labor pool statistics which would be important to determining the question of narrow tailoring).

297. Gary T. Pakulski, *Blacks Big Part of Labor but Not in Top Positions*, TOLEDO BLADE, Feb. 27, 2000, at A1. At the time, about fifteen percent of union members were African American. *Id.*

298. The five largest unions were the Teamsters, American Federation of State, County and Municipal Employees (AFSCME), Service Employees International Union (SEIU), United Food and Commercial Workers, and United Auto Workers. *Id.*

299. *Id.*

smaller geographic districts.”³⁰⁰ The SEIU had implemented a program to train and encourage leaders from minority groups. For the other largest unions, eleven percent of board members were African-American.³⁰¹

The news story on the integration of union leadership quoted experts and union members stating that change came slowly. None of the sources explained that federal courts had interpreted federal law to stop the initiatives that had brought rapid and decisive change. These cases directly limited the possibilities for union action. Nonetheless, the cases dropped into invisibility as background rules, rather than becoming revealing examples of legal obstacles to equality.

V. CLASS AS STRUGGLE—THE ROLE OF LAW

Subordinate groups encounter an enormous array of coercions and constraints. Some they defy, even in the face of state violence; some they seek to alter in various ways; others they simply take for granted and may not even recognize as constraints. These individual and collective responses go a long way toward defining the political outlook of a social movement such as labor.³⁰²

In the historical literature on labor and race, law does not play a large role. William Forbath commented years ago that dedication to writing history from the “bottom up” often leads away from writing about law and state power.³⁰³ The idea that law is largely derivative was a feature of Legal Realist thought.³⁰⁴ A simplified contemporary version of this

300. *Id.*

301. *Id.*

302. FORBATH, *supra* note 3, at xii.

303. *Id.* at 4. Eric Arnesen is an important exception. His research includes legal strategies of black railroad workers as well as their organizational and political strategies, and he has called on historians of race and labor to explore the role of law and the state. See Arnesen, *Up from Exclusion*, *supra* note 71, at 156 (on absence of scholarship on the role of judiciary, agencies, and the state). See generally ARNESEN, BROTHERHOODS, *supra* note 71.

304. Forbath, *supra* note 3, at ix. Forbath says the view of law as derivative has been shared by contemporary labor historians. *Id.* at 2, 3. The debate about law as an independent variable or a social force that operates with at least partial autonomy has many iterations. See, e.g., Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76 (Bryant

concept appears in Michael Klarman's argument that Supreme Court cases generally reflect public opinion.³⁰⁵ The final part of this Article discusses ways in which now-overruled cases that limited civil rights continue to affect both judicial decisions on racial equality and our understanding of the role of law itself.

A. Working Law

During the oral argument in *Hodges*, the Supreme Court Justices questioned the Attorney General about the possible impact of the government's position on labor unions.³⁰⁶ Congressional debates on the Civil Rights Act of 1866 had focused on enforcing the Thirteenth Amendment. The *Hodges* decision acknowledged but dismissed the argument that deprivation of the right to contract was a badge or incident of slavery that Congress could address through its power under the Thirteenth Amendment. Justice Harlan argued in dissent that the disability to contract was an inseparable incident or badge of slavery. The Thirteenth Amendment had itself, without further legislation, conferred the right to be free from badges or incidents of slavery. Therefore, Congress could punish combinations and conspiracies to deny citizens the right to make or enforce contracts for one's personal services on the basis of their race.³⁰⁷

Garth & Austin Sarat eds., 1998) (reviewing extensive literature and discussing interaction of law and movements for social change).

305. See, e.g. KLARMAN, *supra* note 11, at 5 ("When the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary. When the law is indeterminate, judges have little choice but to make decisions based on political factors."); *id.* at 461-62 (arguing against efficacy of result in *Brown v. Board of Education* and discussing factors that made enforcement difficult); cf. GERALD N. ROSENBERG, THE HOLLOW HOPE 431 (2d ed. 2008) (noting that courts can more easily do harm than good and that it is easier to dismantle reform programs than to create them).

306. See Bernstein, *supra* note 63, at 816-17 (quoting oral argument in *Hodges*).

307. *Hodges v. United States*, 203 U.S. 1, 34 (Harlan, J., dissenting). When Gerhard Casper reviewed the legislative history of the Civil Rights Act of 1866, he concluded that *Hodges* had been wrongly decided, pointing particularly to statements that appeared to encompass the ability to reach combinations of whites who sought to control the ability of black workers to make labor contracts freely. Casper, *supra* note 57, at 115, 127; cf. Paul Finkelman, *Civil*

It is not possible to predict with precision the difference a better ruling in *Hodges* would have made for labor, because other rules might have shifted in response. *Plessy v. Ferguson*³⁰⁸ had been law for a decade. The steamroller of disfranchisement had recently moved across the South. The attack on the sawmill in *Hodges* took place just after the Supreme Court decided in *Giles v. Harris* that it could not act in equity to change the disfranchising Alabama constitution.³⁰⁹ If the Court had upheld the convictions of whitecappers in *Hodges*, later decisions could have found ways to cabin the impact of the holding.³¹⁰

Nonetheless, a better holding in *Hodges* could possibly have helped class-based organizing. If unions had been denied the ability to completely exclude African Americans, they might have moved toward segregated locals and

Rights in Historical Context: In Defense of Brown, 118 HARV. L. REV. 973 (2005) (reviewing KLARMAN, *supra* note 11) (arguing that the Court could have reached different decisions in *Plessy* and *Berea College*, among other cases).

308. 163 U.S. 537 (1896).

309. 189 U.S. 475 (1903). In 1904, Giles brought an action for damages for disenfranchised voters; the Supreme Court again held against him and concluded, "The great difficulty of reaching the political action of a State through remedies afforded in the courts, state or Federal, was suggested by this court in *Giles v. Harris*." *Giles v. Teasley*, 193 U.S. 146, 166 (1904). That same year, a disputed election came before Congress in *Dantzler v. Lever*. Dantzler challenged the result of a Congressional election, arguing that South Carolina election law was invalid because it disenfranchised voters in violation of Reconstruction statutes. Congress refused to address disenfranchisement, stating that the courts were the correct forum for such claims because the issue affected so many states and any Congressional decision would affect only one district. See Merrill Moores, collator, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIFTY-SEVENTH TO AND INCLUDING THE SIXTY-FOURTH CONGRESS, 1901-1917, at 25-27 (1917); see also Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENTARY 295, 309 (2000) (discussing *Dantzler v. Lever*).

310. For example, given their approval of segregation in public schools, it is impossible to imagine the justices barring discrimination in private schools as they did in seventy years later in *Runyan v. McCrary*, 427 U.S. 160 (1976). The court could have limited section 1981 with regard to schools by expanding freedom of association or by limiting unconstitutional rules as had been done for decades with jury selection. See KLARMAN, *supra* note 11, at 39-43, 55-59, 126, 255 (discussing limitations of effectiveness of right to serve on juries).

biracial organization rather than complete exclusion.³¹¹ By the 1940s, separate locals for black workers were successfully challenged for creating extreme inequality.³¹² Decades earlier in some southern industries, however, separate unions sometimes provided black workers with a strong base for independent organization and biracial cooperation.³¹³ If unions had been unable to completely exclude African Americans, that could have provided a basis for changing dynamics of class consciousness, strikes, and labor organizing.³¹⁴

311. David Bernstein suggests that the Supreme Court was concerned that adopting the government's broad interpretation of the Thirteenth Amendment in *Hedges* would have created too much governmental involvement with labor unions and policing of union membership. Bernstein, *supra* note 63, at 816-17. The quotes from oral argument in *Hedges* show that the court did consider the effect of such a holding on unions. *Id.* at 816. However, in that period, the Court was not protecting either labor unions or African-Americans, and they had not protected workers' right to a contract that permitted them to join unions. In that context, if the Court had reached the *Hedges* result in order to protect all-white closed-shop unions, it would have revealed more about judicial commitment to white supremacy than to unions.

312. The Boilermakers had a "closed shop" contract in which only union members could work at a shipyard; black workers were required to join "auxiliary" unions that had the same dues, half the insurance benefits, and no power. See Alex Lichtenstein & Eric Arnesen, *Labor and the Problem of Social Unity During World War II: Katherine Archibald's Wartime Shipyard in Retrospect*, LAB.: STUD. WORKING CLASS HIST. AM., Spring 2006, at 113, 138-43. In *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944), the California Supreme Court required that the union either give up the closed shop or admit black workers to membership on equal terms.

313. Eric Arnesen argues that it is a mistake to judge separate unions for blacks and whites by modern standards. In the late nineteenth and early twentieth centuries, black unions could control their finances, elect their own leaders, and advance their own agendas; separate unions did not represent acceptance of second-class status. Arnesen, *Up from Exclusion*, *supra* note 71, at 156-57. On the strengths of biracial organizing in some unions, see, for example, ARNESEN, *WATERFRONT*, *supra* note 71; DANIEL ROSENBERG, *NEW ORLEANS DOCKWORKERS: RACE, LABOR AND UNIONISM* (1988); and Stephen Norwood, *Bogalusa Burning: The War Against Biracial Unionism in the Deep South, 1919*, 63 J. SOUTHERN HIST. 591 (1997).

314. For example, strikebreaking was in part a response to exclusion from work. See, e.g., Eric Arnesen, *The Specter of the Black Strikebreaker*, 44 LAB. HIST. 319, 322 (2006); see also TERRY BOSWELL ET AL., *RACIAL COMPETITION AND CLASS SOLIDARITY* 109-11 (2006) (finding that solidarity and strikebreaking are strongly affected by state repression, favorable federal legislation, employer paternalism, economic recession, and institutionalized inclusion distinguishing

A better holding in *Hodges* might also have affected the white resistance that Bruce Nelson described in steel mills and on the docks. It would be easy to overstate this possibility. Resistance would not have ended simply because the law made an act illegal—those flames shooting from ovens in Youngstown and violent attacks on black home buyers in Los Angeles already violated some laws. A better judicial opinion, without more, would not have produced law enforcement resources or political will.

On the other hand, the moral value of judicial decisions can become practical value in the course of labor or community organizing. Clear liability under civil rights laws could have changed dynamics in some unions. Bruce Nelson quotes a black worker who reported that Harry Bridges had been unwilling to intervene in the San Pedro local and resentful of black workers who turned to courts for relief.³¹⁵ At the time of deregistration of the Unemployed 500, Bridges's supporters had recently lost control of a different local in Northern California and turned to black longshoremen there for support.³¹⁶ If federal courts had threatened to enforce civil rights, the ILWU national leadership might have felt more pressure to avoid the political and economic costs of legal findings of race discrimination, and the legal complaints by African-American dockworkers might have seemed a more imminent threat.

Finally, the structural separation between labor and civil rights enforcement might have diminished if the Civil Rights Act of 1866 had applied to unions before the last third of the twentieth century. Senator Robert Wagner

"institutionalized inclusion"). Institutionalized inclusion means changing racial policy and hiring minority leadership, not merely integrating the union membership. *Id.* at 210. The "formula" that became the basis for successful industrial organizing by the United Mine Workers and then other industrial unions involved recruitment of black organizers and union executives. *Id.* at 5, 120-26; *cf. id.* at 131-133 (describing inability to apply the "formula" when union leadership was conservative and did not recruit or make concerted efforts on behalf of black workers, and when the union allowed a hierarchical system in wages and opportunity to persist); *id.* at 170 (finding formula failed to work during Operation Dixie, when employer paternalism and racist ideology divided workers in the Southern textile industry).

315. NELSON, *supra* note 2, at 126-28.

316. *Id.* at 126-27.

would have included a provision in the 1935 National Labor Relations Act denying a closed shop to unions with discriminatory membership policies, but the provision drew fierce opposition from the AFL and Wagner dropped the provision to save the bill.³¹⁷ Through work on railroad union cases in the 1940s, Charles Hamilton Houston hoped to challenge the right of any union "to represent the craft or the class at all" as long as it excluded workers from membership based on race.³¹⁸ He hoped to deprive exclusionary unions of power by establishing the principle that minority nonmembers must have an equal opportunity to elect the officials who did collective bargaining, censure, and remove them. Decades later, after the enactment of Title VII, judicial enforcement was extremely effective in bringing rapid transformation in union membership.³¹⁹ But the shadow of *Hodges* persisted in the legality of exclusionary white craft unionism under the National Labor Relations Act for decades before Title VII and in the seniority systems that turned past discrimination into durable privilege.

B. Inequality and the Empty State

Pamela Karlan, who has studied *Hodges* more closely than any other scholar, contrasts the protection of private contracts in *Lochner*, decided the previous year, with the refusal to protect the contracts of black workers in

317. PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 29 (2008) (citing Wagner's legislative aide, Leon Keyserling). Frymer states that inadequate black representation in Congress and the labor movement helped defeat proposals for civil rights requirements for the National Labor Relations Act, including a proposal to make racial discrimination in union membership an unfair labor practice. *Id.* But cf. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 291 (1987) (concluding that the NLRA adopted asymmetrical definitions of unfair labor practices of employers but not labor unions in order to increase labor bargaining power).

318. See Goluboff, *Economic Inequality*, *supra* note 84, at 1454.

319. FRYMER, *supra* note 317, at ix (emphasizing importance of institutions and power, rather than psychology, in shaping racism in the labor movement and undoing its effects; *id.* 92-94 (giving statistics on rapid increases in minority membership in labor unions pursuant to judicial orders)). Frymer criticizes the separation of labor and civil rights enforcement as a reflection of divisions in the Democratic Party. *Id.* at 2-3, 13-14.

Hodges.³²⁰ But *Lochner* and *Hodges* have an important similarity: both cases view the state as having limited power to regulate contracts or enforce them against outside interference. The state could protect only groups that could be singled out for separate protection, a category that did not include bakers in *Lochner* or African Americans as the Supreme Court framed the question in *Hodges*. So the question in *Lochner* was not whether the government would enforce contracts, but whether those contracts would be protected from interference by state government.³²¹ The question in *Hodges* was whether the federal government had power to protect private contracts against interference by parties other than the state.³²² *Lochner* limited state power, and *Hodges* limited federal power. The cases shared the concept of an “empty state” within which private transactions are unrelated to state structures and beyond state intervention.³²³

Judicial decisions blocked social transformation after Reconstruction by limiting federal power and narrowing the concept of the state itself. In the “empty state,” a limited government is seen as the shell around a universe of transactions between private actors, with no state responsibility for the terms of those transactions.³²⁴ The *Slaughterhouse Cases* restricted the power of the federal government by denying that the post-Civil-War amendments created federally protected substantive rights.³²⁵ The *Civil Rights Cases* treated public

320. Karlan, *supra* note 21, at 801-04, 809.

321. See *Lochner v. New York*, 198 U.S. 45 (1905); see also OWEN FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 384 (1993) (contrasting *Hodges* with *Plessy*, *Giles*, and other cases and describing *Hodges* as “not an acquiescence in the action of a state, but a *Lochner*-like repudiation of an affirmative act of the national government”).

322. *Hodges v. United States*, 203 U.S. 1 (1906), overruled by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

323. Kenneth Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 253-56 (2000).

324. *Id.*

325. The *Slaughterhouse Cases*, 83 U.S. 36 (1872) did not weaken the concept of the state, but the tortured interpretation of the Privileges and Immunities Clause in that case effectively narrowed the rights enforceable by the federal government and therefore the transformative promise of the Fourteenth

accommodations as inherently private, restricting the power of Congress to reach them under the Fourteenth Amendment.³²⁶

Plessy also narrowed the concept of the state. At first glance, *Plessy* does not look like an “empty state” case. The state of Louisiana was not deprived of power. If the state is so powerful that it can segregate by statute, how can it be “empty”? The narrow construction lay in the way *Plessy* looked at the state and the law. The Fourteenth Amendment protected citizens against state action that deprived them of equal protection. To avoid constitutional problems, the law mandating segregation must not exercise power to treat people unequally. The *Plessy* Court treated segregation as social in nature and implicitly outside of state action, and the opinion maintained that vision even though segregation was required by a statute.

The refusal of whites to associate with blacks was voluntary action, a form of liberty. Racial distinctions were so natural that they were beyond law; law could recognize those distinctions without exercising power unequally. “Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences . . .”³²⁷ When law enforced white refusal to associate with African Americans, the power of the state was neither responsible nor accountable.³²⁸ The state acted with neutrality, to the

Amendment. The state of Louisiana was not “empty” of power; it could create monopoly and therefore regulate private interests. But the decision eviscerated the substance of federal constitutional rights and therefore the power of Congress to protect those rights.

326. *The Civil Rights Cases*, 109 U.S. 3, 18-19 (1883). The *Civil Rights Cases* also held that segregation and refusal of service in public accommodations were not badges or incidents of slavery that could be addressed through Congressional power under the Thirteenth Amendment. *Id.* at 20-24.

327. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

328. See *id.* at 543 (“A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.”). The Thirteenth Amendment was inapplicable because (per the *Civil Rights Cases*) racial differences in public accommodations were not a badge or incident of slavery and segregation in railroad cars was not a form of involuntary servitude. The “underlying fallacy of the plaintiff’s arguments,” the Court stated, was the “assumption that enforced separation stamps the colored race with a badge of

extent that it acted at all, because it merely recognized private, instinctive associational preferences. The statement that racial preferences were not subordination unless a group chose that interpretation was a crucial part of the argument.

Under *Plessy*, when the state recognizes distinctions by enforcing compliance with them, the state is not acting in any way that affected equality. A law that set out to abolish distinctions would be state action—but it would be futile. Every party, even the state, acts within a pervasive market that the state did not create.³²⁹

That concept of the state made *Plessy* part of the foundation for the *Lochner* holding that the state could not regulate private contracts. Neither states nor Congress could enact laws to outlaw “yellow-dog” contracts and protect the workers’ rights to join unions in *Adair v. United States*³³⁰ and *Coppage v. Kansas*,³³¹ because the Constitution required that employers have the option to condition employment on the worker’s promise *not* to join a union.³³² But an employer who succeeded in getting an employee to sign “yellow dog” contract could have the state enforce that contract against union interference in *Hitchman Coal & Coke*.³³³

Hitchman best illustrates the lack of formal equality in the Supreme Court holdings. After previous union drives and strikes, a mine owner made employees sign at-will contracts in which they promised not to join a union while they were employed at the mine. The miners had not violated their contracts because they had not actually joined the union but rather discussed joining if a sufficient number of workers agreed.³³⁴ The miners were free under those at-

inferiority”; segregation could impose inferiority “only if the colored race chooses to put that construction on it.” *Id.* at 551.

329. As Ken Casebeer says, “The Empty State pardons all market participants.” Casebeer, *supra* note 322, at 310.

330. 208 U.S. 161 (1908).

331. 236 U.S. 1 (1915).

332. *Coppage* was the case in which the court used the term “constitutional freedom of contract.” *Id.* at 13.

333. *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229, 255-56 (1917).

334. Justice Brandeis made this point clear in his dissent. *Id.* at 269-74 (Brandeis, J., dissenting).

will contracts to resign at any time they chose to join the union. The Supreme Court was willing to look through the form of the contracts and grant the employer an injunction barring the union from talking with the miners as an interference with those contracts. The constitutional freedom of contract that *Adair* and *Coppage* purported to protect did not extend to the formal right of miners to talk with a union even though the contract did not bar talking. *Hitchman's* generous protection against interference with a contract that did not formally bar such activity is a dramatic contrast to the refusal of the court in *Hodges* to protect the contracts of African-American workers against private interference.

Exclusion was liberty: In *Plessy*, white hostility to sharing space with African Americans seemed so far from state influence that enforcing segregation was a simply way of regulating public safety; in *Hodges*, the violent displacement of African Americans from their jobs was so different from violent appropriation of their work that Congress could not protect them under the Thirteenth Amendment. And constraint was freedom: Under *Coppage* and *Adair*, neither states nor Congress could regulate hours of work or give workers an unconstrained choice about whether to join a union.

The debate about the power and responsibilities of the state has outlived *Plessy* and the cases against labor regulation. That narrow concept of the state was central to the holding in *United States v. Morrison*,³³⁵ which relied in part on the *Civil Rights Cases* to find that Section 5 of the Fourteenth Amendment did not authorize Congress to enact a remedy for private violence in the Violence Against Women Act. State responsibility was also a core issue when the Supreme Court held in *Castle Rock v. Gonzales* that a victim of domestic violence did not have a right to timely enforcement of a protective order that might have prevented

335. 529 U.S. 598, 621-24 (2000) (analyzing the ability of Congress to reach actors other than the state under the *Civil Rights Cases* and citing other post-Reconstruction decisions); see Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481 (2006) (discussing state action doctrine and Reconstruction); see also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441 (2000).

the death of her three children.³³⁶ Jessica Gonzales has pursued a stronger concept of the duties of the state by bringing her case to the Inter-American Commission on Human Rights (IACHR), with a petition citing *DeShaney* and *Morrison* to show the inadequacy of remedies for victims of domestic violence under United States law.³³⁷ The case was submitted in 2008 and, as this Article goes to press, the IACHR is considering whether the United States has an obligation to provide more protection under any of several provisions of the American Declaration of the Rights and Duties of Man than under the Federal Constitution.

C. Inequality as the “Natural” Product of Forces Other than Law

Racial exclusion in the labor market must have affected the development of minority businesses. In refusing to protect contracts for work, *Hodges* had affected the underdevelopment of minority businesses as surely as *Plessy* had shaped unequal schools. When the Court overruled *Plessy*, it recognized the obligation to undo the segregation that *Plessy* had authorized. The decision to overrule *Hodges* in *Jones* should have highlighted the importance of law to discrimination in contract as well as property. Nonetheless, in *City of Richmond v. J.A. Croson*, the Supreme Court placed “societal” discrimination outside the reach of state or local affirmative action programs.³³⁸

The *Croson* holding on “societal” discrimination avoided any recognition of the relationship between unequal market participation and bad constitutional law, effectively protecting the results of the past deprivation of contracts by private actors. *Croson* overlooked so great a history of discrimination in Richmond that it is difficult to argue that a closer reading of *Hodges* and *Jones* would have changed

336. 545 U.S. 748 (2005).

337. Gonzales v. United States, Petition 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (July 24, 2007), available at <http://www.cidh.oas.org/annualrep/2007eng/USA1490.05eng.htm>.

338. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). The court held that it was “sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.” *Id.* at 499; see also *Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (“[R]emedying past societal discrimination does not justify race-conscious government action.”).

its outcome. But the crucial move in *Croson* was to distinguish that history of discrimination as beyond the responsibility of the state. This fundamental retreat by the Supreme Court avoided recognizing the consequences of its bad decision in *Hedges*.

Cases limiting school desegregation remedies have also depended on treating residential segregation as natural rather than a product of state power. For example, in *Freeman v. Pitts*, white preferences for majority-white neighborhoods were treated as a natural force that would prevent stable integration while resegregation was treated as the product of "private choices."³³⁹ In *Missouri v. Jenkins*, both the district court and the court of appeals had found that white flight from Kansas City had been caused by state-sponsored segregation,³⁴⁰ but the majority opinion by Justice Rehnquist took judicial notice of its preferred theory, the "typical supposition" that white flight was caused by *desegregation*.³⁴¹

Justice O'Connor's concurrence did not even consider the District Court's finding that unconstitutional actions caused white flight:

339. 503 U.S. 467 (1992). The district court had heard "evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50-50 mix" and held that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts." *Id.* at 495.

340. 515 U.S. 70, 161-67 (Souter, J., dissenting). In *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), the Eighth Circuit had approved the finding of the district court that Kansas City's constitutional violation, segregation, and the decay of segregated schools caused white flight, *id.* at 1300-01, and rejected an argument by the state of Missouri that white flight was "usually a reaction to just the sort of change that federal courts seek to implement." *Id.* at 1303. The Eighth Circuit noted that state's argument "does not necessarily contradict the district court's findings that state-imposed segregation caused white flight and that the failure to eliminate the vestiges of discrimination contributed to the decline in educational quality and physical plant," and that court-ordered integration would not have been necessary without the because of constitutional violations. *Id.*

341. 515 U.S. at 94-95 (majority opinion).

Whether the white exodus that has resulted in a school district that is 68% black was caused by the District Court's remedial orders or by natural, if unfortunate, demographic forces, we have it directly from the District Court that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries.³⁴²

To Justice O'Connor, the cause might be either nature or the remedial action taken by the district court—but the cause could not lie in the previous segregation. She concluded that the district court could not seek to rectify “regional demographic trends that go beyond the nature and scope of the constitutional violation.”³⁴³

Racial inequality and the ideology that supports it are not natural. Judicial decisions narrowed union activism while moving racial exclusion from workplaces and neighborhoods beyond the reach of federal civil rights law for decades. The current distribution of wealth, power, and control of space can only appear natural if we ignore the role of law in making class mobilization weak and communities segregated.

D. *Law, Culture, and Institutional Rules*

When William Forbath began to study the impact of law on the labor movement, his teachers expected that his research would “simply show that the notorious Lochner Era judiciary and the infamous labor injunction made no big difference in American labor history.”³⁴⁴ Labor historians had the same view. Forbath found that the anti-labor judicial decisions were important in their direct exercise of power and also in the language, ideology, and symbolism that became part of the thinking of labor leaders. He attributed the widespread belief that law would *not* matter to a strong trend in modern social thought to see “the realm of the social and economic as determining, and the realm of law and politics as derivative.”³⁴⁵

Debates in legal theory and history about the impact of legal decisions increased in subsequent years. Do judicial

342. *Id.* at 111 (O'Connor, J., concurring).

343. *Id.*

344. FORBATH, *supra* note 3, at x.

345. *Id.*

decisions shape social movements? Do they create social change? Did *Brown* in particular make effective changes in society?³⁴⁶ *Brown* overruled *Plessy*, but how much difference had the decision in *Plessy* made?³⁴⁷ For decisions that are

346. For example, when Michael Klarman says that “Brown radicalized southern politics, whereas earlier racial changes had not,” he is referring to decisions that made “racial changes” to protect civil rights; he points out that *Brown* contravened the will of white southerners more than decisions integrating minor league baseball teams or hiring place police officers. KLARMAN, *supra* note 11, at 391. He believes *Brown* created a southern white backlash that “increased the chances that once civil rights demonstrators appeared on the streets, they would be greeted with violence rather than with gradual concessions.” *Id.* at 468. He sees progress arising from the reaction to the massive resistance triggered by *Brown*. He believes that *Brown* did relatively little to educate the public (as opposed to motivating resistance and activism among African-Americans) because most people did not change their minds about segregation in response to the decision. *Id.* at 464. This view treats “racial change” as a synonym for progress and overlooks both the difficulty of struggle and the danger of change for the worse. Klarman fails to treat increasing segregation and repression in the post-*Plessy* period as “racial change.” Cf. ROSENBERG, *supra* note 305, at 42-71 (emphasizing the relative importance of action for desegregation by the executive and Congress compared with the limited effect of *Brown* in producing desegregation; omitting discussion of the ways in which *Brown* affected enforcement by other branches).

347. The question about *Plessy* is part of a long debate among historians and legal scholars regarding the relationship between legal decisions and the institutionalization and power of the Jim Crow regime. See, e.g., C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2002) (arguing that segregation was not consolidated as a system before it hardened with legal approval in *Plessy*); WHEN DID SOUTHERN SEGREGATION BEGIN (John David Smith ed., 2002) (collecting various interpretations of the relationship between practices of segregation and legal decisions protecting it); C. Vann Woodward, *Strange Career Critics: Long May They Persevere*, 75 J. AM. HIST. 857 (1988) (responding to critics and emphasizing uneven development of Jim Crow system rather than its timeline). A recent review of a commemorative edition of Woodward’s book emphasized the consistency between Woodward’s approach and modern understandings of racial ideology as unstable, changeable, and formed in particular social, historical, and legal contexts. Michael J. Pfeifer, The Strange Career of Jim Crow, *A Half Century On*, H-NET (2003), <http://www.h-net.org/reviews/showrev.php?id=7561>.

In a study of segregation on railroads in Tennessee, Kenneth Mack summarized the significant debates on the “Woodward thesis”: Woodward’s belief that the enactment of Jim Crow laws had diminished interracial contact against the belief of his critics that law lagged behind social developments and responded passively to those developments, as the arrival of de jure segregation ratified pre-existing practices. Kenneth. Mack, *Law, Society, Identity and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads*,

later discredited, does it matter whether judges were constrained by both social context and the tools for reasoning they had available at the time?³⁴⁸ Do legal decisions follow the direction in which public opinion has already moved—and, if so, what difference do those decisions make?³⁴⁹ How is law constitutive, if at all, of the way people perceive and undertake their life's work and choices? Finally, are there reasons for legal scholars to reject some of these frameworks or adopt others? Taken together, these questions explore the responsibility of law for inequality, methods of work on social justice, and ways to understand the role of legal decisions in society and social change.

Michael Klarman's interpretation of the race cases from *Plessy* to *Brown* rested on the concept that, unless legal rules are unambiguous, courts usually do what most people want them to do. From that position, it is a short leap to treating judicial decisions as evidence of popular opinion.³⁵⁰

1875-1905, 24 LAW & SOC. INQUIRY 377, 380 (1999). New scholarship examining class and racial divisions in black communities helped correct a disproportionate past focus on white attitudes toward blacks that overlooked the positions and actions of African-Americans. Mack found that segregation in Tennessee proceeded dialectically by "fits and starts" as blacks responded to the hardening of white racial attitudes and many groups within society tried assert their interests. *Id.*

348. See, e.g., Jack Balkin, *Wrong the Day it was Decided: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

349. See KLARMAN, *supra* note 11, at 6 (describing judges as "naturally" inclined to sustain disenfranchisement and segregation when most whites believed the Fifteenth Amendment to be a mistake and assumed that blacks were inferior, and arguing that judges reconsidered the meaning of the constitution after racial attitudes had changed); cf. FORBATH, *supra* note 3, at x (describing expectations of his teachers when he began research on impact of labor law).

350. Klarman bootstraps his thesis that judicial decisions reflect public opinion to make the arguments that decisions allowing discriminatory state action do not increase oppression because they reflect pre-existing sentiment and that contrary decisions would be unenforceable. For example, he says of *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), in which the Supreme Court allowed a Georgia county to close the high school for black students while supporting the high school for whites, "With the law indeterminate, the outcome probably depended on the justices' personal views, which likely reflected general social attitudes." KLARMAN, *supra* note 11, at 46. Similarly, Klarman argues that "Court decisions such as *Williams v. Mississippi* (1898) probably played little role in advancing black disfranchisement," *id.* at

That conclusory approach makes the judiciary seem to reflect majority opinion at least as well as the legislature—indeed, at any given time, the judiciary may be more aware of contemporary opinion than would have been possible for any legislature enacting law in the past.

There is a dangerously convenient fit between the idea that law is determined by popular opinion and the idea that white workers are uniquely attached to the protection of white privilege. Together, these two beliefs conceal any role law plays in shaping the conditions under which ideas about race and privilege are produced or reproduced, and they concerned the process in which legal decisions create interactions that in turn shape perception and attitudes.³⁵¹ The danger that the effects of law will disappear into culture or public opinion is particularly important because of the legal doctrines that place “societal” discrimination beyond the reach of legal remedy. These doctrines rely on a fundamentally similar concept of culture and opinion that law does not shape. Put simply, the belief that legal decisions do not change much can conceal a great deal that they do affect—and this is one of the intersections at which the exercise of state power through law becomes invisible.

The choice of time frame predicts the trajectory of Klarman’s findings. His study begins with the legal authorization of segregation and the assertion that segregation was already underway before the Supreme Court blessed it in *Plessy*. This starting line omits earlier legal battles over the meaning of the Reconstruction Amendments and the constitutionality of civil rights

52, or even in legitimating disfranchisement, which he says was already supported by public opinion, *id.* at 53, and that contrary decisions would not have helped: “Had Williams invalidated disfranchisement, it almost certainly would have been ineffectual.” *Id.* at 53; see *infra* text accompany note 358.

351. In an insightful discussion of law and cultural analysis, Austin Sarat and Jonathan Simon suggest that “[L]aw operates largely by influencing modes of thought rather than by determining conduct in any specific case. It enters social practices and is, indeed, ‘imbricated’ in them, by shaping consciousness, by making laws, concepts and commands seem, if not invisible, perfectly natural and benign.” Sarat & Simon, *supra* note 13, at 14. Therefore, law is “constitutive of culture, and it is ‘a part of the cultural processes that actively contribute in the composition of social relations.’” However, agency remains important: “We are not merely the inert recipients of law’s external pressures, but law’s ‘demands’ tend to seem natural and necessary, hardly like demands at all.” *Id.* (quoting Silbey, *supra* note 13, at 41).

statutes.³⁵² Those omissions avoid the impact of decisions such as the *Civil Rights Cases* on culture and behavior. Beginning with *Plessy* and moving toward *Brown* allows Klarman to claim that judges are moving together with public opinion toward change over time.

Public opinion cannot account for the holdings in some of the cases interpreting the Reconstruction amendments narrowly.³⁵³ For example, in *Blyew v. United States*, a Kentucky law barred African Americans from giving evidence against whites.³⁵⁴ The case involved the testimony

352. Starting with *Plessy* near the nadir of race relations gave little scrutiny for the role of the Court in bringing about that low point, which in turn makes it easier to assert that each decision against civil rights reflected public opinion. As Klarman begins with *Plessy*, he relies on scholars who reported that *Plessy* was not treated as an important case when decided and who examined the extent of segregation in the South before *Plessy* to emphasize that it confirmed an existing regime. See, e.g., CHARLES LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987) (discussing extent of segregation before *Plessy*, lack of news coverage of *Plessy*, spread of Jim Crow regime). See generally WHEN DID SOUTHERN SEGREGATION BEGIN, *supra* note 346.

353. See, e.g., *United States v. Reese*, 92 U.S. 214 (1876) (reversing conviction for refusal to register or count the vote of African-American voter in Kentucky six years after passage of Fifteenth Amendment); *United States v. Cruikshank*, 92 U.S. 42 (1875) (reversing convictions for participants in Colfax massacre in Louisiana in 1873).

354. 80 U.S. 581 (1871). In Kentucky, an African American could “be a competent witness in the case of the commonwealth for or against a [slave,] negro, or Indian, or in a civil case to which only negroes or Indians are parties, *but in no other case.*” *Id.* at 582. The Civil Rights Act provided jurisdiction in federal circuit courts to “all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State . . .” any of the rights secured by the first section of the act. *Id.* Kentucky did not allow a child who survived a massacre to provide the only eyewitness testimony that could have convicted the men who murdered her grandmother, so the case was tried in federal court. In *Blyew*, the Supreme Court reversed the convictions on the narrow ground that no living person was “affected” by the granddaughter’s legal disability as required by the statute:

[A]n indictment prosecuted by the government against an alleged criminal, is a cause in which none but the parties can have any concern, except what is common to all the members of the community. Those who may possibly be witnesses, either for the prosecution or for the defence, are no more affected by it than is every other person, for any one may be called as a witness.

Id. at 591-92.

of a child who had witnessed the murder of her grandmother and identified the killers. Courts in Texas, Arkansas and California had already held that the Civil Rights Act of 1866 gave people of all races and ethnicities the right to give evidence, but the Kentucky Supreme Court held in 1867 that the Civil Rights Act of 1866 was unconstitutional and refused to apply it to the evidence code.³⁵⁵ It seems unlikely that public opinion in the United States in 1871 would have supported the Kentucky limit on evidence, and there is no intuitive political appeal to the holding in *Blyew* that the case could not be removed to federal court because neither the child nor her murdered grandmother were “affected” by the Kentucky statute.

The idea that public opinion explains judicial choices also depends on the ways in which consolidating a system of power hides the importance of each of its parts. In states with African-American voting majorities, disfranchising constitutions were a constitutional seizure of power by a white minority, rather than an overextension of majority rule.³⁵⁶ Klarman points to measures in Southern states that had already diminished black voter participation and to a

The grandmother's interest had ended with her death: "Manifestly, the act refers to people in existence. She was the victim of the frightful outrage which gave rise to the cause, but she is beyond being affected by the cause itself." *Id.* at 594. See generally Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989).

355. See ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 178 n. 7 (2004) (citing state court decisions); Goldstein, *supra* note 354, at 484 (discussing *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5 (1867)).

356. See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008). Klarman faces these questions only indirectly in his treatment of *Williams v. Mississippi*, which upheld the Mississippi literacy test and poll tax. 170 U.S. 213 (1898). He argues that cases like *Williams* did little to advance disfranchisement or to legitimate it, and that a Supreme Court holding that disfranchisement was unconstitutional under the Fifteenth Amendment would have made little practical difference. KLARMAN, *supra* note 11, at 53. A Democratic Congress repealed federal voting rights statutes in 1893-1894; later Republican Congresses did not move to reenact them. *Id.* Republicans could have but did not reduce Southern Democratic representation in Congress under Section 2 of the Fourteenth Amendment. *Id.* at 39. Klarman's approach does not consider whether a clear statement from the Supreme Court that disfranchisement was unconstitutional might have affected partisan politics or principled positions on the question of reduced representation.

loss of support for black voters in the North as well, but he does not address the impact of constitutional change on struggle: by making the struggles of black voters vastly more difficult, constitutional disenfranchisement and its justification also suppressed a continuing struggle for public opinion.³⁵⁷ When the court refused to confront disfranchisement directly, it allowed the public to overlook the depth of the attack on democracy.

One of the weakest points of the public opinion theory becomes evident in cases that limit or strike down statutes on constitutional grounds. Legislation fixes the will of the people through elected representatives so that crucial questions need not be restated every session, and elected representatives can repeal statutes. In *Hedges*, the question was whether Congress had the power to punish white conspirators who used threats or violence to drive black workers from jobs because of their race—and, by implication, to drive black farmers from land they leased and worked. Even in Arkansas, substantial public opinion had supported the conviction in *Hedges*, and there is no obvious reason why public opinion across the country would have been more hostile. Even if the public had supported the violent displacement of workers and farmers or objected to legal protection for their rights to contract and property, the popular will could have been effectuated legislatively. Applied to cases like *Hedges*, the public opinion theory would treat judicial action as a way to spare Congress the task of responding to political change by repealing civil

357. Klarman confuses cause and effect when he cites a New York Times article from 1915 as evidence of public opinion in 1900. Compare Klarman, *supra* note 11, at 38 (noting preference for disenfranchisement over violence quoted from the *New York Times* in discussion of 1900), with *id.* at 480 n.96 (citing to the *New York Times*, June 23, 1915). In 1915, the *Times* feared that the alternative to disenfranchisement could again be violence as in the 1890s; that fear becomes evidence of Northern disinterest during the 1890s rather than evidence of a long battle for public opinion over the Fifteenth Amendment that included violence, judicial decisions, and intellectual debate. Klarman has other support for his argument that the North stopped supporting black voters, but his insistence on finding public opinion in Supreme Court opinions, see, e.g., *id.* at 39, misses the role of law in the struggle itself while making judicial decisions seem inevitable.

rights statutes—even though Congress had done just that with the repeal of voting rights in the previous decade.³⁵⁸

The more interesting question involves responsibility for the role of oppressive legal decisions in shaping social outcomes. Law structured the exercise of power and therefore some aspects of the organization of daily life. A contemporary legal debate asks whether judges could have done better with the tools they had available.³⁵⁹ For this Article, the question about judicial alternatives is less important than the impact of the decisions—the interaction between these rules and others. Historicism—the idea that decisions are explained by their context—can be extended to argue that what judges did was what they could have done. That approach gives an aura of inevitability to judicial decisions that cabined or struck down civil rights statutes.

The crucial failing of the public opinion theory is that it folds culture and politics into law in a way that hides both the direct exercise of power and the importance of claims about justice as part of the struggle for social change. Legal decisions affect relations between groups and, with that interaction, affect the evolution of political opinion. In his focus on the ways in which political opinion and legal decisions agree, Klarman misses the interaction of law with society through both power and moral authority.

Law professors face a moral hazard when they conclude that judicial decisions did not matter. The attribution of inequality to public or private causes is the crucial distinction that limits the responsibility of the state. If the state did not act or if no different outcome was possible, that determination can place the problem beyond remedy. It may be easier for courts to exercise power to stifle social change—for example, by forbidding magnet programs to attract suburban students or marginal decisions to integrate schools—than to be an engine for ending

358. See KLARMAN, *supra* note 11, at 53 (discussing repeal of voting rights statutes).

359. Jack Balkin has argued that to call a case “wrong the day it was decided” requires only a showing that the judges at the time could have done something different. Balkin, *supra* note 348, at 725. (“[I]f *Lochner* was wrong the day it was decided, it will be because those who lived in that time, enabled by the tools of understanding that their legal culture offered them, could have done better for themselves. Doing better would have shaped, however subtly, the legal culture they lived in.”).

inequality, which requires more energy and effective implementation. Therefore, legal decisions standing alone may have greater effect when they deny claims for equality than when they uphold them. *Plessy* alone required relatively little enforcement by the state; *Brown* could do little without enforcement. Law is powerful in ways that are not symmetrical. The fact that law alone does not bring change cannot make legal decisions inconsequential; instead, it increases the importance of identifying the impact of legal decisions on oppression.

CONCLUSION

A rationale of history is the first step whereby the dispossessed repossess the world.³⁶⁰

Social understandings of historical injustice are largely constructed in the present.³⁶¹

With regard to class and race, intersecting rules shaped law. The combination of race and labor decisions made labor organizing difficult and race discrimination easy. A change in any rule might change those intersections and affect the impact of other rules.

This Article has presented a limited and qualified defense of Kousser's argument about the importance of institutions and institutional rules rather than culture, attitudes, or other forces.³⁶² It is qualified because Kousser's distinction between law and culture misses some of the ways in which law shapes the world. Moral claims are part of the construction of class.³⁶³ Both history and law affect our understanding of the world in which we live and the actions we need to take.

Hedges created an institutional rule—Congress could not constitutionally reach the actions of private parties to deprive others of rights in property or contract on the basis of race. That rule affected lived experience and organizing options for workers, the legality of excluding minorities

360. KENNETH BURKE, ATTITUDES TOWARD HISTORY 315 (1937).

361. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 57 (2000).

362. KOUSSER, *supra* note 1, at 1.

363. Mahoney, *Class and Status*, *supra* note 6, at 840-41.

from work, the extent of shared interest in collective organizing, the establishment of widespread residential segregation, and the increased danger of private violence to enforce exclusion after *Hodges* held that federal law could not control the nightriders. Although the property rule in the Civil Rights Act of 1866 did not govern seniority rights directly, residential segregation in the twentieth century affected access to jobs and therefore the ability to contract for employment.³⁶⁴ That background law therefore affected the contract rights that were disputed in the cases on seniority, layoffs and recalls.

It is no coincidence that Sections 1981 and 1982 are the right and left hands, as it were, of the process through which civil rights law affected culture. Work and residence are distinct interests, but both are vital, and they affect each other. The Civil Rights Act of 1866 included those issues, along with the ability to sue, be sued, and give evidence, because ending crucial disabilities of slavery would be central to freedom. *Hodges* put those rights in property and contract beyond the reach of Congress for most of the twentieth century. If it is not possible to identify a clear causal link between the decisions that struck down civil rights law and the precise demographic arrangement of a modern metropolis, neither is it possible to separate today's world from the structural power of the judges who decided those cases.

Workers in law should take our own field seriously. Concern with "customs, ideas, attitudes, culture and private behavior" should not overshadow questions of law and power. The modern "anti-transformation cases"³⁶⁵ treat racial privilege as natural and treat measures to end racial inequality as extraordinary and dangerous interventions. Bad decisions protecting white privilege were part of the rules that weakened class-based organizing in the United States and helped conceal the importance of law to inequality. In that history, we can find shared interest in social change as well as hope and direction for the present.

364. The interaction of these rules also affected property: exclusion from work, which would have been covered by the right to contract in section 1981, affected the ability to purchase homes that would have been protected under section 1982 and the neighborhoods in which people lived.

365. Mahoney, *Class and Status*, *supra* note 6, at 880-91.